SUPREME COURT COPY

COPY

No. S122611

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **MAURICE G. STESKAL,** Defendant and Appellant.	(Orange County Sup. Court No. 99ZF0023)

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH
Superior Court of California, County of Orange
Hon. Frank F. Fasel, Judge

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

No. S122611

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Plaintiff and Respondent,	)	(Orange County Sup.
	)	Court No. 99ZF0023)
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	)	
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

CALIFORNIA STATUTES

OTHER STATUTES

RULES OF COURT

JURY INSTRUCTIONS

LAW REVIEWS AND JOURNALS

OTHER SOURCES

STATEMENT OF THE CASE

On July 21, 1999, an indictment was returned by the Orange County Grand Jury and filed in the Orange County Superior Court, Central Justice Center, charging defendant and appellant Maurice G. Steskal in Count 1 with the murder of Bradley J. Riches on June 12, 1999, in violation of Penal Code section 187, subdivision (a).[1] The indictment alleged that this offense was a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(1), that Bradley J. Riches was a peace officer who was intentionally killed while engaged in the performance of his duties, and that appellant knew and reasonably should have known that Bradley J. Riches was a peace officer engaged in the performance of his duties within the meaning of Penal Code section 190.2, subdivision (a)(7). The indictment further alleged that in Count 1, appellant personally used a firearm in the commission and attempted commission of the offense, within the meaning of Penal Code section 12022.5, subdivision (a), that this offense was a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(8), and that the appellant personally used a firearm causing the death in the commission of Count 1, within the meaning of Penal Code section 12022.53, subdivision (d). (1 CT 1, 4-6 (sealed); 4 CT 791-794).[2]

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[1] Before the grand jury indictment, on June 15, 1999, the prosecution filed a criminal complaint in Orange County Superior Court under a different case number, SH99SF0448, also alleging murder with a special circumstance. (1 CT 1-2 (No. SH99SF0448)). Thereafter, on August 18, 1999, after the grand jury indictment was returned, the court dismissed this complaint on the prosecution's motion. (1 CT 8 (No. SH99SF0448).)

[2] As is customary, "CT" refers to the clerk's transcript, and "RT" to the reporter's transcript; volume and page numbers precede and follow, respectively.

On October 21, 2002, jury selection began before the Honorable Frank F. Fasel. (5 CT 1076.) On October 30, 2002, a jury and alternates were sworn to try the case. (5 CT 1108.) On November 4, 2002, the prosecution began the presentation of evidence in the guilt phase of trial. (5 CT 1119.) The presentation of evidence concluded on November 18, 2002, and on that date counsel presented closing argument, and the case went to the jury on guilt. (5 CT 1166-1167.) The following day, the jury announced it had agreed on the verdicts. (5 CT 1310.)

The jury found appellant guilty of murder, and found the special circumstance allegation that the defendant intentionally killed a peace officer who was engaged in the performance of his duties within the meaning of Penal Code section 190.2, subdivision (a)(7) to be true. The jury also found it to be true that the appellant personally used a firearm in the commission of the offense, within the meaning of Penal Code section 12022.5, subdivision (a). Finally, the jury found it to be true that the appellant personally used a firearm causing the death in the commission of Count 1, within the meaning of Penal Code section 12022.53, subdivision (d). (5 CT 1310; 13 RT 2444-2446.)

On November 21, 2002, the penalty phase of the trial commenced. (5 CT 1315.) The presentation of evidence concluded on November 25, 2002. On December 2, 2002, the jury declared it was unable to reach a verdict. The court found the jury was at an impasse. The court declared a mistrial as to the penalty phase. (6 CT 1445-1446.) The court's minute order states:

> The Court inquired as to the numerical division in the final ballot, and the jury foreperson indicated that the final ballot was 11 to 1 for life in prison without the possibility of parole. (6 CT 1446.)

One week later, the prosecution announced its intention to re-try the penalty phase. (6 CT 1448.)

Jury selection for the penalty phase re-trial began on October 14, 2003, and a jury was sworn to try the case eight days later. (10 CT 2469, 2492.) On October 28, 2003, the parties gave opening statements and the presentation of evidence commenced. (10 CT 2500.) The presentation of evidence concluded on December 2, 2003. (10 CT 2597.) Closing argument concluded, and the case went to the jury in mid-afternoon on December 8, 2003. (10 CT 2604-2605.) The jury deliberated on December 9, 2003, December 10, 2003, and December 11, 2003, and returned a verdict of death on December 12, 2003. (11 CT 2848.)

On February 6, 2003, the trial court denied appellant's motion for a new trial as to the guilt phase and the second penalty phase. (11 CT 2945.) The trial court also denied appellant's motion to modify the verdict of death under Penal Code section 190.4, subdivision (e). (11 CT 2951.) The trial court imposed the death penalty for the murder count. (11 CT 2952.)

The trial court additionally sentenced appellant to twenty-five years to life on the Penal Code section 12022.5, subdivision (e) enhancement, and to 10 years imprisonment on the enhancement under Penal Code section 12022.53, subdivision (d), both of which the court ordered stayed based on the judgment of death on Count 1. (11 CT 2952-2953.) The court also ordered appellant to pay a $10,000 restitution fine. (11 CT 2953.)

This appeal is automatic. Penal Code section 1239.

STATEMENT OF FACTS – GUILT PHASE

There is no factual dispute between the parties that on June 12, 1999, appellant shot and killed Orange County Deputy Sheriff Bradley J. Riches in the parking lot of a 7-Eleven store in Lake Forest. The only substantive guilt phase dispute in this case concerned appellant's mental state at the time of the shooting.

The prosecution case, as argued to the jury, was that appellant, a cold-blooded killer motivated by his hatred of law enforcement, armed himself with a semi-automatic rifle, went to a 7-Eleven store near his home in the hope that he would find an officer to kill, and when the opportunity presented itself, seized it, and killed a "hero cop." (7 RT 1157; 12 RT 2232-2234, 2238-2242, 2244.)

The defense case, as argued to the jury (to the extent the defense was permitted to do so under the instructions given by the trial court, which substantially limited the defense, as shown *infra*),[3] was that appellant's actions were the product of his psychotic, paranoid perception that he himself was facing mortal danger from a Sheriff's Department that was out to kill him. (7 RT 1169-1171, 1181; 13 RT 2266-2280.)

A. The Prosecution Case.

The prosecution presented four percipient witnesses and six police and forensic witnesses who offered testimony regarding the shooting of Deputy Riches and its aftermath. The prosecution presented one additional police witness, Deputy Andre Spencer, who testified regarding prior encounters with appellant. The prosecution also played surveillance

[3] The court ultimately sustained the prosecution's objection to the defense request, integral to the defense theory of the case, that the jury be given an instruction on imperfect self-defense. (12 RT 2194-2196; and see 4 RT 530; 4 RT 715-725; 7 RT 1171, 1181; 8 RT 1386-1389; 9 RT 1728-1730.)

videotape of the shooting from the 7-Eleven store. (Exhibits 2-4, 7 RT 1186-1187, 1195-1196.) The central piece of physical evidence presented was Deputy Riches' bullet-riddled vehicle, which the jury was permitted to view during the trial, over defense objection, in the basement of the courthouse where it had been taken. (3 RT 487-494; 6 RT 1137-1140; 7 RT 1141-1142, 1288-1291, 1294-1295.)

1. Testimony of percipient witnesses.

On June 11, 1999, Kimberly Langlois was awakened around midnight inside her second-floor apartment at 22700 Lake Forest Drive, #621, Lake Forest, by banging and thumping sounds from the third-floor apartment directly above hers, #631. (7 RT 1239-1240.) A couple of minutes later, she heard yelling from outside the building, looked out her bedroom window, and saw a man standing by the dumpster who was slamming the dumpster gate while yelling and screaming things like, "Fuck you, world. Fuck you, everybody. I hate everybody." (7 RT 1240.) After she heard the man come up the stairs a couple of minutes after that, she heard crashing and banging sounds outside her apartment, looked out through the peep hole in her door, and saw that the man was carrying a piece of furniture, and was crashing it into the walls as he made his way down the stairs again. (7 RT 1241.) She heard more noise from the dumpster area; and then, after the man came back up the stairs, she heard a woman, whom she believed was the man's wife, attempting to calm him down. (7 RT 1241-1242.) As the woman was trying to soothe him, the man yelled out, "Fuck that, I have guns, I have ammunition," adding something to the effect of, "I am sick of it," or "I am sick of them." (7 RT

1243.) In court, Langlois identified appellant as the man she had seen and heard that night. (7 RT 1742.)

A short time later, at 12:50 AM on June 12, 1999, David Cavallo pulled into the parking lot of the 7-Eleven store in Lake Forest near the corner of Ridge Route and Muirlands, which was about three blocks away from appellant's apartment. (7 RT 1183, 1195-1196, 1264-1265.) His was the only vehicle in the lot, and when he went into the store, he was the only customer. (7 RT 1195-1196.) When he left the store and returned to his vehicle, he noticed another vehicle pulling in, an older Datsun, burgundy in color. (7 RT 1197.)

Vickie De Lara, the sole employee working at the 7-Eleven that night, was mopping the floor at about 1:00 AM, when she saw a man walk in holding a gun. (7 RT 1183.)[4] At first, she thought that he might be a plainclothes policeman. (7 RT 1183-1184.) The man walked to the counter, asked for cigarettes, inquired whether she were afraid of his gun, and said, "I bring this gun to protect myself from [the] fucking law." (7 RT 1183-1184.) After he left the store with his purchase, she saw him fire the gun. (7 RT 1185.) In court, De Lara identified the man as appellant. (7 RT 1185-1186.)

Robert Bombalier, who operated an office in the vicinity of the 7-Eleven, noticed a sheriff's vehicle pull into their shared parking lot between 12:50 and 1:00 AM. (7 RT 1204-1205.) He watched as the vehicle headed in slowly toward the 7-Eleven with its rooftop lights on, then saw it come to

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[4] De Lara's name is also inconsistently spelled "DeLara" in the transcript.

a stop, and he assumed that it was involved in a routine traffic stop of some sort.[5] (7 RT 1206, 1212-1214.) A few moments later, probably within ten seconds or so, he heard a burst of rapid-fire gunshots begin. (7 RT 1206, 1214.) When the gunfire ceased, he left his office and headed toward the sheriff's vehicle. (7 RT 1206-1207.) He saw a lot of broken glass in the parking lot, and observed that the driver's door, which had been closed when he initially saw it, was now partially open. (7 RT 1207, 1215.)

Bombalier saw the silhouette of an individual, back-lit by the lights of the 7-Eleven, and, sometime after, heard a screeching sound and saw a car drive out of the lot, make a right onto Ridge Route, and make a left at the next intersection, heading northbound on Muirlands. (7 RT 1207-1208.) Bombalier moved back toward his office to get a signal on his portable phone, called 911, then went to the sheriff's vehicle. (7 RT 1210.)

Bombalier noticed that the officer's gun was partially out of his holster. (7 RT 1217-1218.) It appeared to him that the officer, whose left leg was cocked in a position toward the door, had been attempting to get out of the car.[6] (7 RT 1216.) The officer was not moving and appeared to be unconscious. (7 RT 1208, 1210.) Bombalier reached in, checked the officer's pulse, and, detecting a pulse, determined that the officer was alive, although he did not seem to be breathing, and was not responsive in any

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[5] David Cavallo testified that after leaving the 7-Eleven parking lot and turning right onto Ridge Route, he also saw the sheriff's vehicle drive into the 7-Eleven parking lot, as he, Cavallo, was waiting at the light at Ridge Route, but that the driver of the sheriff's vehicle had turned off all his lights before entering the lot. (7 RT 1198-1201.)

[6] Bombalier did not recall whether the officer's seatbelt was on or off. (7 RT 1217.)

way. (7 RT 1218.) The car then began to roll forward as the pressure of the driver's foot on the brakes released, and it moved about ten feet before Bombalier was able to reach inside and shift it into park. (7 RT 1211.) When De Lara came out of the 7-Eleven and asked him what had happened, Bombalier told her that an officer had been shot, and asked her to call 911, too. (7 RT 1211.) About a minute-and-a-half later, multiple police personnel arrived at the scene. (7 RT 1211.)

2. Testimony of police and forensics witnesses.

At 12:50 AM on June 12th, Orange County Deputy Sheriff Stephen Torres was on a call with three other deputies at a location about one mile away from the 7-Eleven, when he heard the voice of his fellow deputy Brad Riches over his police radio issuing a "1033" request to clear all radio traffic to make way for an emergency information. (7 RT 1219-1221.) After that initial transmission, Torres did not hear Riches' voice again. (7 RT 1222.) Instead, Torres and the three other deputies heard the sound of gunshots—not over the radio, but through the air. (7 RT 1222.) They immediately surmised that Riches was in a gunfight, and advised dispatch of the gunshots and the direction from which the shots had come. (7 RT 1222.) Torres, who was driving solo, got into his patrol car, and, as he was driving in the direction of the shots, was advised by dispatch that an officer was reported down in the area of Ridge Route and Muirlands, where the 7-Eleven was located. (7 RT 1222.) When Torres, the first officer to arrive, reached the scene, he found Riches slumped over in his vehicle with his chin to his chest, bleeding from what appeared to be multiple gunshot wounds. (7 RT 1223-1225.)

Deputy Sheriff Ron Acuna, the second officer to arrive, was Riches' patrol supervisor. (7 RT 1226-1227, 1234.) Acuna testified that because the 7-Eleven was one of the few convenience stores in Lake Forest that was open all night, it was well known to deputies, who patronized it frequently. (7 RT 1229.) When Acuna arrived, Riches' seatbelt was unfastened, but was still positioned under his arms in such a way that it kept him up, although he was slumped forward with his head down and his arms at his sides. (7 RT 1232.) The locking device on Riches' holster was unsnapped, which indicated to Acuna that Riches had attempted to remove his revolver. (7 RT 1233, 1237.)

Criminalist Elizabeth Thompson arrived at the scene at about 1:30 AM, and conducted an examination of Riches' patrol car. (7 RT 1266-1268.) By that time, Riches' body had been removed from the car and taken from the scene. (7 RT 1266-1267.) The microphone for the car radio was on the driver's-side floorboard, and the hand-held radio was on the driver's seat. (7 RT 1287.) There were many bullet holes in the windshield and the right side of the hood, and the glass in both the driver's window and the front passenger window had been broken out. (7 RT 1268-1269, 1271-1272.) There was a large bullet gouge across the dashboard, and a bullet core between the driver's seat headrest and the seat itself. (7 RT 1270-1271.) Riches' name tag and handgun each appeared to have been struck by bullets. (7 RT 1276.) Thompson recovered three large copper fragments from the front of Riches' bullet-proof vest, which paramedics had removed from the body before she arrived. (7 RT 1276-1277.) In all, Thompson collected a total of 30 spent cartridge casings from the scene, all 7.62 by 39 millimeters in size. (7 RT 1274.)

At 9:00 AM on June 12th, Richard Fukumoto, chief pathologist for Orange County, performed an autopsy on Riches. (7 RT 1297-1298.) Fukumoto found 30 separate bullet wounds to the head and torso, including at least ten that he characterized as entry wounds, four that he characterized as exit wounds, and eleven that he characterized as grazing or gouging wounds (including one to Riches' right hand that amputated his index finger and would have made him unable to use that hand). (7 RT 1299-1305.) One bullet, recovered from inside the skull, had gone through the right side of the head, causing massive damage to the brain. (7 RT 1308.) Another that entered the right side of the neck and exited the left ear area had gone through the throat and tongue. (7 RT 1308.) A bullet that entered the right upper chest at a somewhat downward angle had hit the diaphragm, stomach, and left spleen, and had gone through the heart and lung. (7 RT 1308.) A bullet that entered the lower right chest area had ended up in the left lung, causing massive damage. (7 RT 1308.) Fukumoto determined that Riches had died as a result of injuries to the lung, heart, and brain. (7 RT 1308.)

At about 6:00 AM that same day, Deputy Adam Powell, accompanied by two other deputies, began staking out the apartment complex at 22700 Lake Forest Road. (7 RT 1256-1257, 1260.) Powell was assigned to follow the white Plymouth, license 2 FCC802, belonging to appellant's wife, if it should drive away from the complex. (7 RT 1258.) At about 6:50 AM, the Plymouth left the complex with a female driver and a male passenger, and Powell followed in his unmarked car. (7 RT 1259.) The Plymouth traveled westbound on Lake Forest toward the I-5 freeway, then turned onto the freeway in the southbound direction. (7 RT 1260.) After two additional units joined Powell, he pulled the Plymouth over, and,

together with the other deputies, performed a felony car stop. (7 RT 1260-1261. Appellant was arrested without incident. (7 RT 1264.)

Pursuant to a search warrant, criminalist Elizabeth Thompson subsequently examined the Plymouth.[7] (7 RT 1281-1282.) Inside the trunk she found a disassembled weapon wrapped inside clothing, a MAK-90 Sporter, broken down into about twelve separate pieces. (7 RT 1281-1283; 8 RT 1373.) She found a Sears shopping bag inside the trunk containing 90 cartridges that measured 7.62 by 39 millimeters, as well as two empty drum magazines and seven box magazines. (7 RT 1283-1285.) She also found a Target shopping bag inside a box on the rear passenger floorboard that contained 139 additional rounds of 7.62 by 39 millimeter cartridges. (7 RT 1285.) When Thompson attended Riches' autopsy, she collected seven bullet cores that had been extracted from within Riches' body, as well as additional copper jacketing and bullet fragments, and a bullet extracted from Riches' bullet-proof vest. (7 RT 1286.) She submitted everything she had collected to Ronald Moore, a forensic scientist in the firearms section at the Sheriff's Department's Crime Lab. (7 RT 1286.)

Moore testified that the weapon Thompson found disassembled inside the trunk of the Plymouth was an MAK-90 semi-automatic 7.62 by 39 millimeter rifle, designed to fire one shot for each pull of the trigger. (8 RT 1373.) Moore determined that all 30 cartridges found at the scene of the shooting had been fired from the MAK-90 rifle. (8 RT 1380.) Moore also was able to determine that two bullet fragments recovered from Riches' vehicle, and three recovered from his vest, had been fired from the

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[7] Thompson also examined a second vehicle, a 1994 burgundy Nissan, license plate 3UWG802, and found appellant's driver's license and registration inside. (7 RT 1281.)

same rifle.[8] (8 RT 1381.)

3. Testimony regarding prior incidents with Deputy Andre Spencer.

On March 28, 1999, about two-and-a-half months before the shooting of Deputy Riches, appellant had had an encounter with another Orange County Sheriff's Deputy, Andre Spencer, when Spencer stopped appellant for driving without wearing a seat belt. (7 RT 1310, 1312; 8 RT 1344, 1351.) At the time of that incident, Spencer had been an officer for eight-and-a-half years, including about two years working on patrol. (8 RT 1332.) Spencer testified that when he pulled in behind appellant's vehicle in a left-turn lane, preparatory to making the traffic stop, he observed appellant hit his steering wheel with his hands a couple of times. (8 RT 1330.) When Spencer subsequently made the stop, appellant pulled his car over to the curb and immediately opened his car door, exited the vehicle, and faced toward Spencer. (8 RT 1330-1331.) No one Spencer had previously stopped had ever jumped out of their car like that, and Spencer, who had once seen a videotape in a training class in which a driver gets out of his vehicle during a traffic stop and fires at the officer, immediately drew his gun. (8 RT 1830-1831.)

Although Spencer had been trained not to let his emotions interfere with his professionalism, and to do everything he could to de-escalate

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[8] Moore also participated in a search of the residence at 22700 Lake Forest Drive, #631 at about 11:00 AM on June 12, 1999, when another rifle, a Norinco, Model NHM-91, was found. (8 RT 1371-1372.) Moore testified that the Norinco differed from the MAK-90, in that it had a longer barrel and an attached bipod, but that both rifles were designed to use the same ammunition. (8 RT 1372.) Also found during the search of the residence at that time were a 1,000-round box of 7.62 by 39 caliber ammunition, as well as a number of 12-gauge shot shells, and about half a box of 9-millimeter Luger ammunition. (8 RT 1372.)

situations, Spencer used profanity in addressing appellant, both as an expression of the high degree of anxiety and nervousness he was feeling, and as a means to assert control over him. (8 RT 1329, 1333, 1335.) Spencer testified that he felt at the time that appellant was a threat to him because of his aggressive behavior both in driving his car, and then in getting out of the car after he had pulled to a stop. (8 RT 1367.)

Much of the incident was video-and audio-recorded by means of the video system with which Spencer's patrol car was equipped, which was designed to come on automatically whenever Spencer activated his siren and overhead lights. (7 RT 1311.) There was, however, a gap of about 30 seconds during which the audio portion of the videotape did not record any sound -- but Spencer testified that he did not cause it, and that the system didn't work all the time. (8 RT 1367-1368.)

In the police report that he filed regarding the incident, Spencer stated that appellant had consented to a search of his person. But there is no audio of any such consent anywhere on the videotape. (8 RT 1354-1355.) Spencer testified that appellant gave his consent during the period that no audio was recorded on the tape. (8 RT 1355-1356.)

The stop began at 7:45 AM on a Sunday, and before it was over, Spencer had been joined by four other deputies. (8 RT 1358, 1360.)

At some point, Spencer unbuckled appellant's belt as they stood along a public street, pulled the belt open, opened the fly of appellant's pants, and searched inside appellant's underpants. (8 RT 1358-1359.) After appellant took exception to the procedure, he was wrestled to the ground, and arrested for two misdemeanors, possession of less than an ounce of marijuana (recovered from inside a pants pocket), and obstructing, delaying, or resisting an officer in performance of duties. (8 RT 1342,

1360-1361; 12 RT 2176.)

On the way to jail, appellant was driven to his home. (8 RT 1340.) While appellant was kept in custody inside the patrol car, Spencer and another deputy went inside his apartment. (8 RT 1341-1342.) Spencer testified that his purpose in going there was not to search appellant's residence, but to check on the welfare of appellant's wife. (8 RT 1342-1343.) Spencer made no mention in his patrol log or his police report of his visit to appellant's residence. (8 RT 1342-1343.)

About a month after this March 28th incident, Spencer had a second contact with appellant when he stopped him for the vehicle code infraction of failing to signal for a turn. In this encounter, appellant had a passenger in the car. Appellant was non-confrontational and, Spencer told another officer, he was "polite." Spencer did not issue a ticket. (8 RT 1344-1346.) Although department policy required that deputies record all stops on the patrol car video system, Spencer did not record this stop. (8 RT 1349-1350.)

B. The Defense Case.

The defense presented six expert witnesses, foremost of whom was psychiatrist Roderick Pettis, as well as nine additional percipient witnesses who testified as to appellant's disturbed mental state and behaviors during the months and years prior to the night he shot and killed Deputy Riches.

1. Testimony of Roderick Pettis, M.D.

Roderick Pettis, M.D., testified about his psychiatric evaluation of appellant for the presence of a mental illness.[9] (11 RT 2045, 2051.) In

[9] Pettis, a medical doctor specializing in psychiatry, was both a clinical and a forensic psychiatric. (11 RT 2045.) In his clinical practice he provided psychotherapy and medication; and in his forensic practice he had previously been qualified as an expert in both civil and criminal cases, and had consulted for both prosecution and defense. (11 RT 2046, 2051.)

addition to interviewing appellant personally three times for a total of about eight hours, Pettis reviewed 246 items of written materials, including police reports, investigative reports, academic reports, medical psychiatric records, and interviews with people acquainted with appellant. (11 RT 2051-2052.) On Axis I of the DSM-IV,[10] Pettis diagnosed appellant as suffering from a major mental illness, "delusional disorder, persecutory type," a psychotic disorder connoting a break with reality.[11] (11 RT 2052, 2055.) Pettis also diagnosed appellant as suffering from both "dysthymic disorder," a chronic low-level depression, and from poly-substance abuse. (11 RT 2052.)

On Axis II of the DSM-IV,[12] Pettis diagnosed appellant as suffering from a schizotypal personality disorder pre-existing since childhood. (11 RT 2052, 2060.) In diagnosing this underlying condition, Pettis considered the reports from two other experts, Dr. Missett and, in particular, Dr. Asarnow, whose neurological testing was integral to Pettis's opinion. (11 RT 2064.) From early childhood, appellant displayed evidence of suspiciousness, distrust, and odd thinking. (11 RT 2060.) Appellant was

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Pettis graduated from Boston University Medical School, completed an internship in psychiatry at the University of California San Francisco, and completed medical residency at Harvard Medical School where he also completed a one-year fellowship in forensics. (11 RT 2046.) His forensic training included training in the area of malingering. (11 RT 2046.)

[10] Unless otherwise noted, references in this brief to the "DSM" are to the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (text rev. 4th ed. 2000) (*DSM-IV-TR*).

[11] Pettis distinguished psychotic delusional disorder from a schizophrenic disorder in which hallucinations would be present and the delusions would be bizarre (e.g., not merely "being followed," but "being followed by Martians"). (11 RT 2053-2054.)

[12] In the terminology of the DSM-IV, Axis I pertains to the primary conditions that would be the focus in treating the individual (i.e., the clinical disorder), and Axis II pertains to the personality disorder or other condition (such as mental retardation) that underlies the conditions that would be treated. (11 RT 1947-1962 (testimony of Dr. Missett).)

one of six siblings, and within the family home, there was a great deal of physical abuse as well as neglect. (11 RT 2062-2063.) The father was often absent, and when he was present, he drank, became mean, and punished the children harshly. (11 RT 2062-2063.) His chronic expression at home of feelings of distrust of authority and of being unappreciated and victimized in his workplace contributed to the formation of appellant's own attitudes and perception of the world as an unsafe place in which he was powerless to prevent being abused and neglected. (11 RT 2065-2066.) All the children in the family displayed serious problems, and appellant's situation was exacerbated by the particularized abuse he suffered on an ongoing basis at the hands of his older brother Bobby, who, acting out of his own frustrations and anxieties, regularly victimized appellant, both physically and emotionally, for more than eight years, from the time appellant was about four until he was twelve or thirteen. (9 RT 1676-1678; 11 RT 2065-2066.) Bobby (Robert Steskal, Jr.) himself stated that he had perceived appellant as "an easy mark" because he was weak and vulnerable. (9 RT 1693.) No one else in the family ever interceded on appellant's behalf. (11 RT 2067.)

When appellant entered kindergarten, his teachers noted that he was immature and underdeveloped, and that, by his own report, he felt isolated and vulnerable. (11 RT 2068.) At the end of the year, his teachers recommended that he repeat the grade, but his parents ignored their advice. (11 RT 2068.) After being promoted from kindergarten, he had to repeat both the first grade and the second grade, and was finally referred to the New England Medical Center for psychological evaluation because he was not learning. (11 RT 2068-2069.) The Center found no significant learning disorders that would account for appellant's academic failure, but noted that

he was weak and vulnerable and felt victimized. (11 RT 2069.)

Appellant's childhood problems continued into his adolescent years. (11 RT 2070.) From ages 14 through 18 he displayed a profound continuity of feelings of weakness, vulnerability, victimization, and impotence, and a high degree of anxiety. (11 RT 2070.) At about age 14, appellant began using drugs, which Pettis testified was not uncommon among people with a history such as his; appellant, already exhibiting symptomatology of mental illness, was "self-medicating." (11 RT 2071-2072.) The altered states that the drugs induced would relieve his anxiety and his feeling of being unsafe, but their use would also trigger the onset of secondary drug problems. (11 RT 2071.) Appellant's first drug of choice was inhalants, including airplane glue, Pam cooking spray, and gasoline, and he developed a very severe addiction. (11 RT 2071.) His parents tried to deal with his use of inhalants by increasing their punitive beatings to an extreme level, including beatings with PVC tubing that left marks and bruises. (11 RT 2074.) Appellant later moved on to poly-substance abuse, including alcohol, prescription drugs, marijuana, peyote, and LSD. (11 RT 2075.)

As he reached adolescence, appellant's suspiciousness and distrust of others continued, and he began expressing his odd and unusual patterns of thinking to others. (11 RT 2076.) In the relationship sphere, he remained isolated, experienced difficulty making friends, and showed no interest in women. He was very uncomfortable around them, and his psychological and sexual development was severely arrested. (11 RT 2077-2078.) He began cross-dressing, wearing his mother's and his sister Annalisa's clothes.[13] (11 RT 2077.) On one occasion he touched Annalisa

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[13] Unbeknownst to appellant until a later age, his brother Scott was also cross-dressing at the time. (11 RT 2077.)

sexually, molesting her without intercourse.[14] (11 RT 2078.) He developed a habit of masturbating with a frequency that was almost obsessive. (11 RT 2079.) When he was 14 or 15, he and his brother Scott would talk frequently about possibly killing each other. (11 RT 2082.) When he developed an interest during adolescence in Christianity, the Bible, and particularly the Book of Revelations, he became obsessively guilty about both his drug use and his masturbation. (11 RT 2080-2081.)

Appellant's chronic drug use persisted beyond adolescence, and he continued to self-medicate throughout his adult life. (11 RT 2083-2084.) Suicide also remained an ongoing theme throughout his adult life, and Pettis found no evidence that appellant used his expressions of suicidal thoughts as a manipulative device. (11 RT 2082-2083.) In the occupational sphere, appellant was an ineffective worker who had difficulty negotiating even the simplest task, was distrustful of people in authority, and had multiple employers because he usually could not keep a job. (11 RT 2085.) Appellant became increasingly paranoid during the late 1980's and early 1990's, and expressed conspiracy theories that people were following him, that satellites might be observing him, and that he was being talked to and monitored through his television set. (11 RT 2091.)

At one point, appellant fell in love with a prostitute in Mexico, spent substantial amounts of money on her, repeatedly asked her to marry him, and fell into despair when she would not do so. (11 RT 2086.) When, at the height of his despair, he chanced upon a Bible passage about "the concubine and the prostitute," he performed a blood sacrifice on the Bible page, hoping and believing that his doing so would cause her to change her

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[14] Pettis testified that through the subsequent years, appellant was remorseful and very tormented about that episode, and continued to apologize for it. (11 RT 2079.)

mind. (11 RT 2086.) Regarding a period in which appellant lived as a recluse in a concrete bunker in Oregon, Pettis characterized appellant's behavior as symptomatic of the mental illness that Pettis diagnosed. (11 RT 2090.)

Appellant's paranoia underwent a further substantial increase during the 1990's, and, in Pettis's opinion, even before the first 1999 incident with Deputy Spencer, appellant was chronically paranoid throughout the decade. (11 RT 2092-2093.) Pettis reviewed the videotape of the March 28, 1999 encounter with Deputy Spencer, and in Pettis's opinion, that encounter exacerbated appellant's pre-existing paranoid symptoms into full-blown psychotic delusions. (11 RT 2095-2096.) His fear of being followed, monitored, and observed escalated into feeling that the police were going to kill him. (11 RT 2096.) Appellant had a distorted perception about what was taking place during the encounter, focusing on what he perceived as the sexual inappropriateness of the search, and believing that his testicles had been touched. (11 RT 2096.) Because of his predisposition toward a heightened sensitivity to sexual issues, he became fixated on the incident, and became convinced that the Orange County Sheriff's Department was indeed going to kill him. (11 RT 2097.) His mental illness was further exacerbated by Spencer's searching his apartment with a second deputy, which appellant took to be further evidence of a breach of trust. (11 RT 2101.) His delusional disorder was further affected by being stopped again by the same deputy some weeks later; believing that the threat was now closing in on him, he became extremely destabilized. (11 RT 2097.) During the couple of months leading up to the homicide, he was not processing anything properly, and was acting out of his delusional system. (11 RT 2098, 2101.) He remained profoundly fixated on the original

incident with Deputy Spencer, and complained about it to everyone, telling them that "they are coming to get me." (11 RT 2098.) He became even more reclusive, preferring to remain in the mountains where he could be away from all the threats he believed he faced at the hands of the Orange County Sheriff's Department. (11 RT 2098.) He was in a state of significant despair. (11 RT 2098.) He wanted to avoid any contact with law enforcement, and was profoundly fearful and anxious about the possibility of any such contact. (11 RT 2102.) When he would ride in a car with his wife, he would be obsessive about her not exceeding the speed limit. (11 RT 2102.) He had pervasive feelings of being monitored and spied on, and ripped out a coaxial cable that he believed was being utilized for surveillance. (11 RT 2102-2103.) His life was crumbling around him. (11 RT 2103.) Just days before the homicide, he became suicidal at his wife's apartment and grabbed roach or rat poison. (11 RT 2099.) After she managed to get it away from him, he tried to put spray starch into his mouth. (11 RT 2099.) Appellant was suicidal on the morning prior to the homicide, when he left the mountains and returned to Lake Forest to fulfill legal obligations arising from the March 28, 1999 traffic stop by Deputy Spencer. (11 RT 2105.) His behavior at his wife's apartment later that night reflected his general instability and the exacerbation of his mental illness. (11 RT 2107.) He was extremely upset about having been required to come down from the mountain, his stress and anxiety levels were extremely high, and he was in extreme despair. (11 RT 2107.) In overview, appellant experienced victimization during childhood, a complete mental illness through his adulthood, and, after the traffic stop, an exacerbation of that mental illness and a concomitant instability. (11 RT 2104.)

2. Testimony of other expert witnesses.

Charles Duke, Jr., an expert on police procedures,[15] testified that Deputy Spencer's conduct in connection with his stop of appellant on March 28, 1999 was unprofessional, unacceptable, unreasonable, unnecessary, inappropriate, and had no legitimate law enforcement purpose. (9 RT 1603, 1611-1615, 1617-1620, 1622-1628, 1631-1636, 1641-1652, 1656, 1659-1670.)

Duke commented on the videotape of the incident while it was played for the jury during his testimony. (9 RT 1618.) Duke testified that it is not uncommon for a traffic violator to be upset and to pound the dash or hit the steering wheel when being stopped, or to get out of his car and question the deputy as to why he had been stopped. (9 RT 1611, 1614, 1618-1619, 1660-1661, 1669.) In the situation as shown, an officer would be trained to look at the violator's hands for weapons, the waist area for a possible concealed weapon, and the pockets and ankles for bulges. (9 RT 1619-1620.) Spencer's verbal response, telling appellant to "get back in the fucking car," was unsound. (9 RT 1620.) Profanity should not be used unless and until the person does not respond to initial commands. (9 RT

[15] Duke testified that he had recently retired from the Los Angeles Police Department after 28 years of service. (9 RT 1597-1598.) As a SWAT officer, he taught law enforcement self-defense at the LAPD Academy. (9 RT 1600.) As a supervisor, he evaluated the performance of other officers on a daily basis, and worked on Internal Affairs complaints including those involving claims of excessive force against civilians. (9 RT 1601-1602.) He sat on the Los Angeles Police Department commission for discipline and review, which considered use-of-force incidents. (9 RT 1603.) He served as an instructor or consultant with about 400 other agencies, including the FBI Academy. (9 RT 1602.) Duke had previously testified for the prosecution in federal and state courts on about ten occasions as an expert on use-of-force issues, and had testified on behalf of police officers about 20 or 25 times in trial board proceedings. (9 RT 1603-1605.)

1620.) Spencer's physical response, drawing his handgun and aiming it at appellant, was unjustified because no reasonable threat to his safety had presented itself. (9 RT 1623-1624.) After appellant returned to his car, Spencer had an opportunity to de-escalate the situation. (9 RT 1625-1626.) Appellant was apologizing for his actions, saying that he had been upset and had a lot on his mind, that he had had an argument with his wife, and was upset about getting a ticket. (9 RT 1625-1626.) Spencer kept the situation from de-escalating by keeping his handgun in the low-ready position and continuing to ask appellant, "Why did you beat me out of the car?" (9 RT 1627-1628.) After Spencer called for backup, and four other deputies arrived, Spencer persisted in maintaining a control hold by interlocking the fingers of appellant's right and left hands.[16] (9 RT 1630-1631.) Instead of performing a pat-down search, which is directed at finding a weapon, Spencer performed a pocket-search, which is directed at finding contraband. (9 RT 1631-1632.) The audio temporarily ceased recording for a brief period of time; during this time, Spencer subsequently testified, appellant gave his consent to being searched. (9 RT 1634.) As he was searching appellant's pockets, Spencer further escalated the situation by remarking to the other deputies, "This fucking guy gets out of the car, gets out of the car before I get out of the car." (9 RT 1635-1636.)

Spencer then undid appellant's belt buckle, unzipped or unsnapped his pants, and reached his hand into an area inside the waistband, a search that Duke characterized as beyond the scope, as one that he had never seen conducted on a public street in his 28 years of law enforcement experience, and as one that both escalated the situation, and degraded and humiliated

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[16] Duke noted that the other deputy depicted in the video at that point had not drawn his gun, which indicated that he did not perceive any threat. (9 RT 1631.)

the suspect. (9 RT 1641-1642.) When appellant reacted by attempting to hold his pants up, the other deputies pinned him against the car and wrestled him to the ground, and Spencer remarked, "Now you are going to fucking jail." (9 RT 1643.) When appellant said, "You are hurting me," a deputy responded, "We want to hurt you." (9 RT 1644-1645.) While appellant was being pinned against the car, Spencer called him a "mother-fucker," and after appellant had been taken into custody, Spencer referred to him as a "fucking asshole." (9 RT 1649-1651.)

In Duke's opinion, appellant's heightened anxiety (as indicated by his saying, "You wonder why people go berserk in society. You push people for no fucking reason.") was a product of the way he was treated, including Spencer's agitating remarks throughout the incident. (9 RT 1667.)

Robert Asarnow, Ph.D., testified about his neuropsychological assessment of appellant, which included both the administration of a battery of neuropsychological tests, and a comprehensive review of appellant's school records. (10 RT 1771, 1791.)

According to Dr. Asarnow, appellant's results on a number of sensitive brain functioning tests were consistent with a schizophrenic spectrum disorder. (10 RT 1860.) Asarnow testified that appellant's school records showed, among other things, fine motor coordination problems that were very commonly found in the developmental history of people who went on to develop schizophrenia and, in fact, indicated a genetic liability to develop schizophrenia. (10 RT 1857-1859.) Asarnow did not do a diagnostic interview of appellant, and was not called upon to render a psychological or psychiatric diagnosis. (10 RT 1848-1853, 1861.) Asarnow could exclude malingering in appellant's case, as the testing panel

was designed to screen for it, and appellant showed no evidence of malingering. (10 RT 1867-1871.)

James Missett, M.D., a psychiatrist, testified about his psychiatric diagnoses of several members of appellant's family, and his analysis of their family dynamics. (11 RT 1928, 1933-1938.) Missett was not asked to perform a psychiatric evaluation of appellant. (11 RT 1935-1936.) Missett found substantial evidence of mental disorders in appellant's family. For example, Missett diagnosed appellant's brother Scott, two years younger, as suffering from a delusional disorder of the persecutory type. This is a psychosis. (11 RT 1981-1983.)

David Smith, M.D., a psychiatrist, testified as to dual diagnosis – that is, the process of assessing whether a person who has used drugs suffers from drug use alone or from both drug use and mental illness. (10 RT 1885, 1895-1908.) Smith testified that he would expect that someone suffering from paranoid delusional disorder (which is a schizophrenic spectrum illness disorder) would self-medicate with marijuana. (10 RT 1907.)

Kris Mohandie, Ph.D., a licensed psychologist who worked full-time for the Los Angeles Police Department, testified about a syndrome known as the "fight or flight" response.[17] (11 RT 2012, 2019-2021, 2024-2029.) In his preparation for testifying in this case, Mohandie reviewed the videotape from the 7-Eleven store. (11 RT 2018.)

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[17] In addition to his work for the Los Angeles Police Department, in which he both trained officers to deal with the fight or flight response, and counseled officers who had been involved in police shooting incidents, Dr. Mohandie maintained a private consulting practice. (11 RT 2012.) He previously qualified as an expert in state and federal court, in both civil and criminal cases, and he testified for the prosecution more often than for the defense. (11 RT 2105, 2018.)

Mohandie described the fight or flight response as something that people experience when presented with what they perceive to be a potentially dangerous situation. (11 RT 2019.) Certain psycho-physiological processes occur within all people so affected, across the board. (11 RT 2019.) Even before the individual realizes that he or she is afraid, the individual's body is reacting, preparing either to flee or to do battle. (11 RT 2019.) The syndrome affects an individual's perceptions, and brings with it behavioral and cognitive changes. (11 RT 2019-2020.) With the introduction of adrenaline into the sympathetic nervous system, the heart rate increases, digestion slows, blood chemistry changes, breathing becomes shallower and more rapid, and pupils dilate. (11 RT 2021.) Tunnel vision occurs because in a threatening situation, it doesn't serve a person to pay attention to extraneous details. (11 RT 2027.) This physiological process results in a tremendous narrowing of perception and an exclusive focus on the potential threat. (11 RT 2027.) Misperceptions of reality are the norm in such situations, and what people are able to see and hear is adversely affected. (11 RT 2028.) Cognitive scope narrows as well, and the individual's capacity to perceive other options is reduced accordingly. (11 RT 2027.) These behavioral and cognitive changes explain why people subsequently express the feeling of having been "on autopilot." (11 RT 2029.) Part of the perception is a sense of one's own vulnerability, which is absolutely real to the person, regardless whether the perception on which it is based is itself real or imaginary. (11 RT 2029.) These changes are automatic, and are not susceptible to conscious control. (11 RT 2029.) This altogether normal human response sometimes accounts for what appears to be excessive violence, or "overkill." (11 RT 2020.)

The response of a particular individual, when faced with such a

stress situation, would be affected by his or her previous training and experience, if any; by traumas that the person might be carrying; and by other aspects of the individual's mental state. (11 RT 2033.) Paranoia typically will prime an individual to overreact, because he is already in a chronic state of hypervigilance, a condition which Mohandie described as being very nearly a chronic state of fight or flight. (11 RT 2033.) Because hypervigilance depletes many chemicals, including serotonin and dopamine (or "noradrenaline"), which are involved with the regulation of emotional reactions, the paranoid individual is primed to "go off," and a fight or flight situation is a very dangerous scenario for him. (11 RT 2035-2036.)

Mohandie testified that, while he did not know whether appellant was in the fight or flight response at the time of the shooting of Deputy Riches, a person's having fired a large number of times might point in the direction of the individual's fight or flight response, and having been in a reactive state. (11 RT 2038.)

3. Testimony of percipient witnesses.

Cherie Le Brecht testified that she and her young son shared the apartment at Lake Forest Drive with appellant and his wife Nannette for about three years prior to the night of the shooting of Deputy Riches. (8 RT 1486.)[18] Le Brecht described appellant as being shy, reclusive, and a loner, and as having religious beliefs about the end of the world that she felt were extreme. (8 RT 1487-1490.) She regarded him as being both paranoid and depressed. (8 RT 1498, 1501.) He talked with her about government conspiracies, thought that everybody was watching him and that he was

[18] Nannette Steskal's first name is also inconsistently spelled "Nanette" in the transcript.

being followed, and believed that he was under surveillance inside his home by government agents who were observing him via his television set. (8 RT 1499-1500.) He was very nervous around the police, and his concern about them rose to the level of an obsession. (8 RT 1499.)

Le Brecht testified that for a period of about eight months prior to the incident with Deputy Spencer on March 28, 1999, appellant had seemed to be getting calmer and less paranoid; but that in the aftermath of the incident he was very nervous that the police would pull him over again, and his paranoia and behavior became worse. (8 RT 1505.) When he talked about the body search that Spencer had conducted, he said that his pants had been pulled down on a public street. (8 RT 1501-1504.) He seemed embarrassed and humiliated by the experience. (8 RT 1525.) .

During the period leading up to the shooting, appellant had been staying at the apartment only intermittently, and Nannette had been dating other men. (8 RT 1491-1492.) On the night of June 11, 1999, Le Brecht, who had fallen sleep before 11:00 PM, was awakened at about 11:30 by the sounds of appellant's and Nannette's raised voices inside the apartment. (8 RT 1491, 1495.) She couldn't hear what they were saying, but appellant sounded upset, and Nannette seemed to be trying to find out what was bothering him. (8 RT 1495-1496.) At some point when appellant's voice was raised, she heard him yelling, "Fuck 'em." (8 RT 1496.) She had heard him say that before, typically in reference to an authority figure, but usually only after he had been drinking. (8 RT 1497.) Le Brecht testified that in the time she knew appellant, she never heard him make threats against anyone, or say anything about hating the police, or about wanting to get

even with them or kill them. (8 RT 1511-1512, 1524.)

Jocelyn Avendano testified that she had known appellant's wife, Nannette, in the Philippines, and was visiting at their apartment on the night of the incident with Deputy Spencer. (8 RT 1528-1530.) Avendano, who was sleeping on a mattress in the living room, was awakened by a knock on the door, and opened her eyes to see two policemen. (8 RT 1532.) She watched as they entered the apartment and walked around the living room, kitchen, and Nannette's bedroom, and she observed them take one or two cigarettes from the kitchen ashtray. (8 RT 1533-1534.) Afterwards, she and Nannette picked up appellant from the jail, and he told her that when the police came to the apartment, he was in custody outside, having been pulled over for not wearing his seat belt. (8 RT 1542.) He said that he had been searched, that his testicles had been touched, and that he had been thrown to the street. (8 RT 1542-1543.) When he recounted this, he looked sad and humiliated. (8 RT 1543.) Avendano testified that she never heard appellant say that he wanted to hurt the police, or kill the police, for what they had done to him. (8 RT 1542-1543.)

Ralph Pantoni testified that he met appellant in early November 1998. (8 RT 1391.) Pantoni, who was homeless at the time, was looking for food inside a dumpster behind a Lucky's market when appellant appeared, commiserated with him, gave him a dollar, and offered to show him how to earn a living by doing reclamation mining, as appellant himself was doing. (8 RT 1391-1395.) They soon became very close, and over the next seven months until June 11, 1999, Pantoni accompanied appellant about 15 or 20 times to his mining site on a mountain in a remote area near

the eastern edge of San Diego County, just north of the Mexican border, where they would camp, in separate tents, for two or three days at a time. (8 RT 1397, 1400, 1402-1405, 1407.) Appellant was separated from his wife Nannette during this entire period and was living in his car, although Nannette would sometimes permit him to stay inside their apartment. (8 RT 1401-1402.) Appellant and Nannette had an open relationship, and she was dating other people, but appellant was not. (8 RT 1401-1402.)

Pantoni described appellant as a troubled person who was very reclusive and very sensitive about other people's reactions. (8 RT 1424.) Appellant would talk, as a regular topic of conversation, about the government spying on him. (8 RT 1427.) He would say that the government could control traffic lights to keep someone waiting longer. (8 RT 1428.) He believed that the government was monitoring him through the TV in his apartment, and was surveilling him through the cable box. (8 RT 1429-1430.) He believed that his wife was informing on him to his parents, and that his parents had a private investigator following him. (8 RT 1428-1429.) He felt that he was being watched constantly. (8 RT 1431.) Pantoni heard appellant speak often, perhaps 20 or 30 times, about committing suicide, and personally observed him put a shotgun inside his mouth, and also try to drink Drano. (8 RT 1425.) Appellant appeared to Pantoni to be an authority on the Bible, and regarded the Book of Revelations, and Armageddon, as pertaining to the present time. (8 RT 1423.)

Appellant's troubled beliefs and behaviors worsened after his March 28th encounter with Deputy Spencer. (8 RT 1426, 1432.) Appellant recounted the incident to Pantoni, and told him that he was strip searched.

(8 RT 1446.) He told him that Spencer put on a latex glove, brought his hand down to appellant's genitals, and massaged him instead of patting him down; and that he believed it to be a sexual gesture. (8 RT 1446.) He said that after his pants dropped all the way down and he tried to grab them, two other officers punched him in his head or back. (8 RT 1447.) He said that during the search, the police laughed at him. (8 RT 1447.)

Pantoni observed that after his arrest that day, appellant became even more reclusive. (8 RT 1449.) His paranoid beliefs seemed to have been verified, his suicide threats intensified, and he seemed tormented, confused, and very depressed. (8 RT 1449, 1454-1456) Appellant even looked different, and the appearance of his eyes and his entire demeanor changed. (8 RT 1450.) He began going to the mountain more often, and he told Pantoni that he was staying out of town because "they" were after him. (8 RT 1451.) When Pantoni was with him there, appellant had nightmares and would talk in his sleep. (8 RT 1451-1452.) He would yell, "Don't let them get me," and "They are not going to do this to me." (8 RT 1451-1452.) This behavior had not occurred prior to the arrest, and began immediately after it. (8 RT 1452.) Pantoni told appellant that he needed to seek professional help. (8 RT 1453.)

When Deputy Spencer pulled appellant over for a second time, Pantoni was present, and was seated in the front passenger seat. (8 RT 1457-1458.) Pantoni testified that appellant was stopped at a light, and had his blinker on to signal a turn. (8 RT 1460.) Spencer pulled up at the same light with his blinker on, signaling a turn in the opposite direction. (8 RT 1460.) Appellant recognized Spencer, and told Pantoni that Spencer was going to come after them. (8 RT 1460-1461.) When appellant made his turn, Spencer turned off his opposite-turn signal, followed them, and pulled

them over. (8 RT 1461.)

Pantoni testified that Spencer came to appellant's window with a smirk on his face. (8 RT 1462.) He told appellant that he had pulled him over for failing to signal a turn, and asked him if he had taken care of his ticket from his previous arrest. (8 RT 1462-1465.) Pantoni told Spencer that he believed that he was harassing appellant, and Spencer eventually let them go without giving appellant a citation. (8 RT 1463, 1465.)

After this second encounter with Deputy Spencer, appellant's paranoia became much worse. (8 RT 1467.) He would bring Spencer up in conversation two or three times every day, and, for the first time since Pantoni had met him, he would cry. (8 RT 1467-1469.) Appellant asked Pantoni to help him check out the cable box inside the laundry room of his apartment complex, and wound up ripping the box from the wall and smashing it. (8 RT 1469-1471.) Pantoni testified that at no point, either before or after either of the traffic stops, did he ever hear appellant say that he was going to get even with a police officer, or kill a police officer, or do anything whatsoever to a police officer, or threaten to do anything to anybody. (8 RT 1471.)

David Rodering, who had known appellant since 1995, saw him shortly after the March 28, 1999 incident with Deputy Spencer. (8 RT 1545-1546.) Appellant, who had a bruised forehead, told Rodering that he had been beaten up by several officers, and had been physically searched in front of people. (8 RT 1546, 1548.) He said that he had had his clothing removed, and had been handled physically in his private parts. (8 RT 1549.) His demeanor was that of someone who felt extreme humiliation. (8 RT 1549.)

When Rodering next saw appellant about a month later, he observed

a very big change in him. (8 RT 1550.) Appellant was shaking; and when he tried to speak, his voice, too, would shake. (8 RT 1550.) He would break into tears, and ask, "Can they do this to me, can they do this to me?" (8 RT 1550.) He kept saying that "they are coming after me, they are going to kill me." (8 RT 1550.) The incident with the sheriff's department was all that he would talk about. (8 RT 1551.) He said that they had stopped him a second time, that they were following him, and that they were watching him on television. (8 RT 1551.) He never said, however, that he wanted to get revenge, or wanted to hurt anyone, or was going to try to kill anyone. (8 RT 1553.)

Michelle Houser, who had known appellant for about ten years, was present when appellant spoke with Rodering shortly after the March 28th incident. (8 RT 1555-1556.) Appellant was very nervous, very fearful, and was shaking. (8 RT 1557.) He told her that he had been worked over by the police, that they had stripped and searched him in public, and that he was very humiliated. (8 RT 1556-1557.) He kept saying that they were after him, they were watching him, they were following him, they were tapping his phone, and they had put things in his TV. (8 RT 1557.) He said that he just wanted to leave, go to the mountains, and get away from the police following him. (8 RT 1558.) She had never seen appellant like this before. (8 RT 1558.) She next saw him a couple of days prior to the shooting of Deputy Riches. (8 RT 1559.) Appellant, who appeared very depressed and very distraught, spoke to her of his continuing fear about the police following him and tapping his phone. (8 RT 1560.) On neither occasion did appellant say anything about wanting to hurt or kill the police. (8 RT 1561.)

Robert Eeg testified that he had known appellant since 1985, when

appellant was in his mid-20's, 14 years prior to the events of 1999. (10 RT 1758.) Eeg operated a business in Laguna Hills building sailboats, and both appellant and appellant's brother Scott were his employees. (10 RT 1758-1759.) Appellant performed menial labor for Eeg, including working with fiberglass, sanding the boats, and cleaning up the work area, for seven years from 1985 until 1992. (10 RT 1759, 1761.) Appellant worked hard and was a good employee, but couldn't handle even simple tasks without direction; he had no common sense and no social skills. (10 RT 1762, 1764-1765.) He was totally paranoid, and was so over-sensitive about taking direction that even constructive criticism would devastate him to the point that he would just close down and remain angry for weeks afterwards. (10 RT 1762-1765, 1767.) Appellant had no friends, no social life, and no apparent social activity. (10 RT 1766.) Appellant's brother Scott had similar problems, but they were not as severe as appellant's, and when Eeg needed to tell appellant what to do, Scott would serve as an intermediary. (10 RT 1766.) Appellant and Scott had a close relationship, and Scott would serve as appellant's "handler." (10 RT 1767.) Appellant was scared of everybody. (10 RT 1768.) He was very afraid of the Orange County Sheriff's Department, and in the course of a year would tell Eeg on several occasions that he had been hassled by them. (10 RT 1768.) From as early as 1985 or 1986, Eeg would see appellant at the shop with an AK-47. (10 RT 1769.) When Eeg would ask him what he was doing with a rifle, appellant would say, "I need it for protection. They are after me. I need it for protection." (10 RT 1769.) Appellant would identify the "They" who were out to get him as being law enforcement or the government. (10 RT 1770.) This was a constant theme during the entire seven years, from 1985 to 1992. (10 RT 1770.)

Annalisa Le Croix, appellant's sister, testified that during the early 1980's she and her then-husband lived in Rogue River, Oregon. (12 RT 2159-2161.) During much of that time, appellant lived alone without electricity or running water on a mountainside about 15 miles away on land her husband co-owned. (12 RT 2161.) For over two years, appellant lived inside a concrete bunker the size of a small bathroom, with no windows and no toilet facilities. (12 RT 2162.) Appellant was afraid to leave the mountain. (12 RT 2166.) He would walk with a gun on his shoulder, and when he would ride a bicycle to a store for groceries, he would carry guns with him inside his duffel bag. (12 RT 2168.) He believed that the government or law enforcement was watching him. (12 RT 2167.) On one occasion when she visited him, she found that he had smeared purple blackberry juice over his face as camouflage because he believed that someone was in the nearby woods. (12 RT 2167.) During his time there, he dug an escape tunnel from his bunker that went down ten feet through granite deposits, and wore his pickaxe down to a stub in the process. (12 RT 2166.) He believed that he needed the escape tunnel as protection from people he believed were coming onto his property at night to watch him, whom he feared were going to come and get him. (12 RT 2166.)

C. Stipulation.

The parties stipulated that after appellant's blood was drawn at 11:11 AM on June 12, 1999, the lab results were negative for everything that was screened, which included cocaine, methamphetamine, opiates, barbiturates, cannabinoids, and alcohol. (12 RT 2175.)

STATEMENT OF FACTS – PENALTY PHASE RE-TRIAL

The jury that found appellant guilty in his original trial was unable to agree on a verdict in the penalty phase; the first jury deadlocked, voting 11-1 not to impose the death penalty. (14 RT 2743-2744.)

The prosecution elected to re-try the penalty phase before a new jury, presenting once more the guilt-phase evidence presented to the original jury, plus a large quantity of additional evidence. The volume of testimony at this retrial of the penalty phase greatly exceeded the volume presented during the entirety of the first trial, including both the guilt phase and the original penalty phase.[19]

A. The Prosecution Case

1. Evidence Regarding Circumstances of the Crime.

The prosecution presented six percipient witnesses and sixteen law enforcement and forensic witnesses who offered testimony regarding the shooting of Deputy Riches and its aftermath.

The central piece of physical evidence presented was a life-size, full-featured mannequin (People's Exhibit 51), dressed in Deputy Riches' bloodied, vomit-stained uniform, and impaled with rods indicating the trajectories of every bullet that struck him, which the jury, over defense objection, was permitted to view during the testimony of the pathologist who performed the autopsy. (20 RT 4011-4013, 4021-4022.)

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[19] Witness testimony and ancillary matters during the original trial amounted to approximately 1,110 pages of trial record, including 993 for the guilt phase and only 117 for the penalty phase. Testimony and ancillary matters during the penalty-phase retrial amounted to approximately 2,620 pages.

Also over defense objection, the prosecution again was allowed to introduce into evidence Deputy Riches' bullet-riddled patrol vehicle, which the jurors viewed during the trial. (10 CT 2550.)

As in the guilt phase, the prosecution also presented surveillance videotape of the shooting from the 7-Eleven store. (Exhibit 55, 20 RT 3978-3980, 4082-4083, 4101.)

a. Testimony of percipient witnesses.

Appellant's downstairs neighbor, Kimberly Ann Langlois, testified that shortly after midnight on June 12, 1999, she was awakened by loud thumping or stomping sounds.[20] (23 RT 4436-4438.) When she then heard loud crashing sounds from the stairway outside her front door, she looked out the peephole, and saw appellant holding a broken chair in his hand and banging it against a wall. (23 RT 4438.) She watched from her window as he threw the chair into a dumpster, and she heard him yell repeatedly "Fuck you, world. Fuck you everybody. I hate everybody." (23 RT 4438-4439.) Appellant was still yelling as he came back up the stairs. (23 RT 4440.) Appellant's wife met him on the stairway and tried to calm him down, and appellant eventually went back to the their apartment with her, saying as he went, "I am sick of it. I am sick of it. I have guns, I have ammunition." (23 RT 4440-4441.) Langlois, who had lived at the apartment complex for about two months, but had never previously met, seen, or heard appellant or his wife, was scared for her personal safety, and thought that if she heard more yelling she would call the police. (23 RT 4441-4443.)

David Cavallo testified that sometime before 1:00 AM on June 12, 1999, he drove to the 7-Eleven store at Muirlands and Ridge Route in Lake

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[20] Langlois lived on the second floor of the apartment complex at 22700 Lake Forest, and appellant's apartment on the third floor was directly above hers. (23 RT 4434, 4437.)

Forest. (20 RT 4081.) The store was about three blocks away from appellant's apartment complex. (20 RT 4341.) Cavallo parked in the lot outside, went into the store, where he was the only customer, bought a few items, and then returned to his car. (20 RT 4082-4083.) As he was backing out of his parking space, another vehicle, an old Datsun, maroon or burgundy, pulled into the space on his left. (20 RT 4083, 4085.) Cavallo drove from the parking lot onto Ridge Route. (20 RT 4085.) As he waited at a red light, he saw a police car drive into the 7-Eleven parking lot with its lights off. (20 RT 4085-4088, 4090-4092.)

Vickie DeLara testified that on June 12, 1999, she was working the 10:00 PM-to-6 AM shift at the 7-Eleven. (20 RT 4094.) She testified that after Cavallo left the store, a man carrying a gun came into the store and asked to buy cigarettes. (20 RT 4095-4096.) She identified the man in court as appellant. (20 RT 4096.) At first, she thought that the man was a police officer. (20 RT 4111.) Appellant asked her if she were afraid of his gun, and when she replied that she was not, he told her that he had it only to protect himself from the "fucking law."[21] (20 RT 4097-4098.) As he was leaving the store, she saw a patrol car arrive in the parking lot with its red lights on.[22] (20 RT 4098.) DeLara watched from inside the store as appellant moved toward the car, firing his weapon multiple times. (20 RT 4099-4100.)

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[21] Deputy Valerie Lucas, who interviewed DeLara minutes after the incident, testified that DeLara told her that appellant had said, "Don't be scared. I only carry this to protect myself from the fucking law." (21 RT 4260.)

[22] Deputy Lucas confirmed that DeLara told her the patrol car's overhead lights had already been activated when she saw it driving into the lot. (21 RT 4262.)

Robert Bombalier testified that in the early hours of June 12, 1999, he was working at his computer in his office near the 7-Eleven. (21 RT 4151-4153.) At 12:50 AM, he saw a police car with flashing overhead lights drive through the parking lot and pull to a stop. (21 RT 4154-4155, 4167.) He assumed that a routine pullover was in process until he heard the sound of gunfire. (21 RT 4156, 4168.) At that point, he left his office and went toward the police car. (21 RT 4156.) As he did so, he heard a car start up, then saw it drive off with a squealing of tires.[23] (21 RT 4157.) Seeing that the officer in the car was down, he went back to his office for his portable phone, then called 911 as he returned to the police car. (21 RT 4158.) The driver's door was open, the officer was unconscious, and there were gaping holes in his body. (21 RT 4164-4165, 4169.) The officer's pulse was weak and his heart was racing. (21 RT 4159, 4164.) The car engine was on, the vehicle was in drive gear, and the officer's foot was on the brake. (21 RT 4162-4163.) As his foot on the brake relaxed, the car started to roll forward, and Bombalier reached inside and shifted it into park. (21 RT 4163.) At this point, police cars began converging on the parking lot. (21 RT 4165.) Bombalier noticed that the officer's sidearm was partially out of his holster, and his left leg looked as if the officer had been attempting to step outside of his car. (21 RT 4164-4165, 4170.)

b. Police and forensics testimony.

Deputy Steven Torres testified that on June 12, 1999 at about 12:50 AM, while he was providing backup to two other deputies on a residential

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[23] Bombalier described the car as being dark in color and mid-sized or smaller. (21 RT 4171.) Two other witnesses who lived in the vicinity, Maria Lea Grau and Jason Jay Sardo, testified that after hearing gunshots, they saw a car speeding away from the scene. (21 RT 4174-4175; 21 RT 4178-4180.) Grau described the vehicle as small and burgundy in color, Sardo as small and maroon. (21 RT 4175; 21 RT 4180.)

street in Lake Forest, he heard a radio call and then, within moments, heard gunshots through the air. (21 RT 4187, 4193.) He and the other deputies ran to their cars and, responding to the direction of the shots, drove straight to the intersection of Ridge Route and Muirlands where the 7-Eleven was located. (21 RT 4190, 4194-4195.) When he arrived there, he saw Deputy Riches slumped over in his car with what appeared to be multiple gunshot wounds. (21 RT 4196.) After putting out a call for other units to set up a perimeter, Torres spoke with DeLara, determined that the store's surveillance video had been functioning during the incident, went inside the store, reviewed the tape, and saw footage of the person carrying the rifle. (21 RT 4198-4199, 4205-4206.) He then broadcast a description of the suspect. (21 RT 4206.)

On June 12, 1999, Sgt. Ron Acuna was working as a patrol supervisor, and Deputy Riches was working under his supervision. (21 RT 4215, 4220.) Responding to a call from dispatch, Acuna arrived at the 7-Eleven right behind Deputy Torres, immediately checked Riches for a pulse, and could not detect any sign of life. (21 RT 4225-4226, 4228-4229.) A paramedic unit responded within two minutes, and transported Riches to Mission Community Hospital.[24] (21 RT 4228.) When Acuna found Riches, his seat belt was unlatched, but it had not retracted and was caught up under his arms. (21 RT 4229.) Riches' holster was unsnapped, which indicated to Acuna that he had attempted to draw his gun. (21 RT 4230-4231.)

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[24] Paramedic Eric James Gafner testified that when Riches was placed inside the ambulance, he had no pulse and was not breathing on his own. (22 RT 4290.) He had some electrical activity to his heart, but it was not beating. (22 RT 4290.) Attempts were made to start an IV and to intubate him for an airway, but he was unconscious and unresponsive to any stimulants. (22 RT 4290.)

Pathologist Richard I. Fukumoto, who performed an autopsy on June 12, 1999, testified that as a result of multiple gunshot wounds to his heart, liver, lungs, stomach, and brain, Riches had died almost immediately after being shot. (20 RT 4019, 4034, 4036-4037.) In all, there were 30 gunshot wounds. (20 RT 4020-4034.)

At 6:10 AM on June 12, 1999, Probation Officer Christopher Bieber and Deputies Adam Powell and David Chewiwie positioned themselves in an unmarked vehicle outside appellant's apartment complex at Muirlands and Lake Forest. (22 RT 4297, 4301-4303, 4312; 22 RT 4323-4324; 22 RT 4346.) Bieber had already seen the surveillance videotape from the 7-Eleven, and the officers had a specific license plate that they were watching for. (22 RT 4331; 22 RT 4327.) At about 6:50 AM, they saw the suspect vehicle, a white 1987 Plymouth hatchback, exiting the apartment complex's parking lot. (22 RT 4304, 4306; 22 RT 4325.) A woman was driving the vehicle, and appellant was riding in the front passenger seat. (22 RT 4307; 22 RT 4325.) The officers followed for a short distance, then sounded their siren to pull the vehicle over, ordered the occupants to exit, and took them into custody. (22 RT 4305-4306, 4308-4311; 22 RT 4325, 4332-4340; 22 RT 4346.) The driver was subsequently identified as appellant's wife, Nenita Steskal. (22 RT 4336.) Probation Officer Bieber observed that the mustache that appellant had previously worn appeared to have been freshly shaved off. (22 RT 4315.)

Deputy Ken L. Hoffman, a homicide investigator, joined the other deputies at the scene of the car stop, and then obtained a search warrant for appellant's residence and for the two vehicles with which he was associated. (23 RT 4459, 4461-4462.) Hoffman, who had previously reviewed the surveillance video from the 7-Eleven, then participated in executing the

search warrant at appellant's residence. (23 RT 4461, 4463.) Hoffman did not find an intact shirt resembling the shirt with an emblem in the chest area that appellant had been wearing in the surveillance video, but he did seize a shirt from which the front center section had been cut out and removed. (23 RT 4464.) Among the items seized was an unsent, three-page letter, handwritten by appellant in a spiral notebook,[25] and addressed to his Aunt Dot. (23 RT 4466.)

Elizabeth Ann Thompson, a senior forensic scientist with the sheriff's department crime lab, documented evidence and conditions at the crime scene after initially arriving there at about 2:30 AM on June 12. (22 RT 4375-4378.) She found 30 cartridge cases in the vicinity of Riches' car. (22 RT 4385.) From her observations of the locations of bullet holes, broken glass, and blood and blood spatter, she determined that the shots had come from the area of the southeast corner of the 7-Eleven. (22 RT 4390.) Thompson also went to the hospital and, later, to the autopsy, where she collected Riches' clothing and equipment as well as some copper bullet jackets and steel bullet cores.[26] (22 RT 4381-4382, 4384.) That same morning, Thompson participated in the search of the white Plymouth in which appellant and his wife had been apprehended. (22 RT 4395-4396.) Found on the rear seat and inside the hatchback area were seven shotgun shells, 320 bullets, and a disassembled weapon, a Norinco MAK-90. (22 RT 4397-4401.) Thompson also participated in the search of a 1994

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[25] Forensic document examiner Michael Peter Gryzik, who compared the letter against an exemplar of appellant's handwriting, testified that in his opinion, appellant had written the letter. (23 RT 4475, 4479-4480, 4483.)

[26] At a much later time, Thompson participated in putting Riches' clothing and equipment on the mannequin that was displayed to the jury during testimony about his autopsy. (22 RT 4382.)

burgundy Nissan Sentra, from which she collected appellant's driver's license. (22 RT 4401-4402.)

Ronald Moore, a forensic scientist with the sheriff's department crime lab, recovered Deputy Riches' weapon from the crime scene, and determined that, although it was fully loaded, it had been rendered inoperable by the damage it had sustained. (23 RT 4506, 4511-4512.) Moore also examined the Norinco MAK rifle recovered from the white Plymouth, and found it to be a semi-automatic Chinese version of a Russian AK-47 rifle. (23 RT 4512-4514.) Moore examined the 30 cartridge cases retrieved from the crime scene, and determined that all had been fired from the Norinco MAK rifle. (23 RT 4515, 4523.) Albert Trinh, a special agent for the Bureau of Alcohol, Tobacco and Firearms, testified that the rifle had been purchased on March 16, 1993 by Scott Steskal.[27] (23 RT 4554, 4565.) Kenneth Paul Thompson, a forensic specialist, testified that he had compared inked fingerprints of appellant to latent prints recovered from the rifle, and identified one of the prints as coming from appellant's left ring finger.[28] (23 RT 4550-4551.)

2. Evidence Regarding Other Alleged Circumstances in Aggravation.

The prosecution presented evidence pertaining to three incidents: A) appellant's encounter with Maryland State Trooper John Hassler, nearly nineteen years prior to the shooting of Deputy Riches; B) appellant's conviction for cultivation of marijuana nearly sixteen years prior to the

[27] Scott Steskal is appellant's brother. (29 RT 5533.)

[28] Kayla Jean Robinson, a supervising forensic specialist for the sheriff's department, had obtained latent fingerprints from the rifle, and Sharon Krenz, a senior forensic specialist, had taken the fingerprint impressions from appellant. (23 RT 4543-4546; 23 RT 4548-4549.)

shooting of Deputy Riches; and C) appellant's alleged escape attempt from Santa Ana Jail about two months prior to the commencement of the second penalty phase. The prosecution also presented six victim-impact witnesses who testified about their grief over the loss of Deputy Riches, based on their professional and personal relationships with him, and about his character traits of dependability and loyalty, empathy, honesty, being non-judgmental, and being family-oriented.

a. Appellant's encounter with Maryland State Trooper John Hassler.

John Hassler testified that on July 26, 1980, he was a Maryland State Trooper, on patrol in Calvert County. (19 RT 4047.) At about 7:00 PM, he observed two vehicles, a Datsun and a motorcycle, traveling in excess of 100 miles per hour in a posted 55 miles per hour zone. (19 RT 4048, 4052.) He called in their license tag numbers to his dispatcher, and pursued them, (19 RT 4050.) When he stopped the Datsun near a church parking lot, he found that the driver was Scott Steskal (appellant's brother). (19 RT 4051.) As he was giving the Datsun driver a speeding ticket, appellant drove up on his motorcycle, but did not initially interfere, either physically or verbally, with Hassler's performance of his duties. (19 RT 4053, 4071.) Appellant remained seated on his motorcycle, parked on a gravel surface. (19 RT 4072-4073.) When Hassler finished giving Scott Steskal his ticket, he began approaching appellant on foot. (19 RT 4072.) Appellant suddenly accelerated, drove past Hassler, returned to the highway, and drove away. (19 RT 4073-4075.) As appellant accelerated on the gravel surface, his motorcycle fishtailed, and threw gravel into the air. (19 RT 4073.) As Appellant's motorcycle passed by Hassler with about six to twelve inches to spare, Hassler jumped further out of the way, and did not suffer any injury

in the process. (19 RT 4062, 4075.) Hassler testified that appellant had not made any attempt actually to strike him. (19 RT 4070.) Hassler got back into his patrol car, and pursued appellant again, but lost sight of him. (19 RT 4055, 4076.) Later, another trooper called in saying that he had found the motorcycle on a beach, seemingly abandoned, with a helmet beside it. (19 RT 4055.) When Hassler arrived there, appellant approached him on foot, making no effort to run away. (19 RT 4077.) Hassler took him into custody, and appellant did not threaten him physically or verbally, or assault him in any way. (19 RT 4078.) Hassler arrested appellant for traffic violations and assault upon a police officer for the earlier incident. (19 RT 4080.)

b. Appellant's conviction for marijuana cultivation.

The prosecution introduced Exhibits 48 and 49, certified copies of appellant's guilty plea and subsequent conviction in Maryland's Calvert County Circuit Court for manufacturing marijuana, a felony, on August 23, 1983. (24 RT 4572.)

c. Appellant's alleged attempted escape from Santa Ana Jail.

Janell Clinkingbeard, a detention officer at Santa Ana Jail where appellant was confined prior to his penalty phase retrial, testified that on August 25, 2003, she became aware that a metal piece was missing from a hair clipper used by inmates. (24 RT 4575-4576.) She checked her log and discovered that appellant, who was expecting a visit at 9:00 PM that evening, was the only inmate who had used the hair clippers that day. (24 RT 4579.) Before taking appellant to meet his visitor, she patted him down, and found the missing metal piece from the hair clipper inside his

left breast pocket. (24 RT 4583-4585, 4587.) While appellant was with his visitor, she arranged for other officers to search his cell. (24 RT 4587.)

Detention officer Kelvin LeGeyt testified that he conducted the search along with detention supervisor Guillen. (24 RT 4622.) On appellant's bunk they found a piece of metal, resembling a hair clipper, which was attached to a paper handle. (24 RT 4625.) They also noticed an area of the wall, approximately 8 inches by 12 inches in size, that had been dug away to a depth of about one-third of an inch. (24 RT 4623-4624.) The wall itself was solid cement, and was about 24 inches thick. (24 RT 4641; 24 RT 4684, 4690.) LeGeyt surmised that the piece of metal attached to a paper handle, which they had found on appellant's bunk, might have been used as a scraping tool to dig at the wall. (24 RT 4626.) He and Guillen also found another device that could be used as a digging tool: a pill bottle, partially filled with paper napkins, containing a Walkman battery in which a second piece of metal was embedded. (24 RT 4628, 4630, 4645.) LeGeyt testified that while either device could also conceivably be used a weapon, he couldn't say that that was their intended use. (24 RT 4627, 4632-4633, 4647.) He and Guillen also noticed that appellant's mattress looked lumpy, and it appeared as if the stitching had been pulled apart and then re-stitched. (24 RT 4635.)

Detention officer William Santa Ana testified that when he was called to appellant's cell that evening to photograph the contraband found there, he too noticed that appellant's mattress appeared to have been altered. (24 RT 4649-4650.) When he cut it open, he found 21 strips of torn sheets inside, each about seven feet long. (24 RT 4651-4652.) Sgt. Amelia Saunders, the chief of security at Santa Ana Jail, testified that the total length of the torn sheets, 147 feet, exceeded the distance from the roof of

the jail to ground level, which she guessed to be about 70 or 80 feet. (24 RT 4670-4671, 4683-4684.)

d. Testimony of victim-impact witnesses.

Santa Ana Fire Department Captain James Henery testified that Riches had been his best friend, and that he had shared things with Riches he had never shared with anyone else. (24 RT 4691-4692.) They first met when they were both 17 years old and were taking after-school classes relating to the fire service. (24 RT 4693.) Subsequently, when they were both volunteer firefighters in the 80's, they lived together as roommates. (24 RT 4694.) Early one morning they were called to a trailer park in Irvine where an elderly man had just died. (24 RT 4695.) Henery and the rest of the crew felt uncomfortable being with the grieving widow, but Riches held the woman's hand and listened to her tell the story of meeting the decedent and of their life together. (24 RT 4695.) In recent years, Riches was very close with Henery's children, and after Riches died, Henery put together a scrapbook for them documenting his friendship with Riches, and told them that Riches had gone to heaven to be with God. (24 RT 4692, 4695-4696.) Henery testified that on one occasion when he and Riches were having lunch at a restaurant, another patron came over to their table and exchanged pleasantries with Riches. (24 RT 4719.) When the man left, Riches told Henery that the man had been an inmate at the jail where Riches had worked as a guard. (24 RT 4719.) On another occasion, when Riches was working in a group home for disabled children, he learned sign language so that he could converse with a deaf girl who was living there. (24 RT 4721-4722.)

Deputy Sheriff Scott Vanover testified that he had met Riches in late 1998, and that they had become really good friends during the six to nine

months before Riches died. (24 RT 4724-4725.) Vanover had had a hard time coping with the loss of an older brother who died when Vanover was 11 or 12 years old, and Riches' death affected Vanover in much the same way. (24 RT 4726.) During the brief time they knew each other, they traveled together to England to visit Riches' mother who was living there. (24 RT 4727.) On their flight to England, Riches walked up to a girl who was standing and reading a book, and just started talking to her. (24 RT 4728.) When they were in England, Riches walked up to another girl who, as it turned out, was from Maryland, and started talking with her, and she took a photo of Riches and Vanover. (24 RT 4727.) As she was snapping the photo, Riches put his hand on Vanover's shoulder. (24 RT 4727.)

Deputy Sheriff Eric Hendry testified that he met Riches in early 1999 when Riches was newly undertaking patrol duties. (24 RT 4729-4730.) As Riches' training officer, Hendry accompanied him in a patrol car for eight to ten hours each day teaching him how to do his job safely and properly, and in the process they became personally very close. (24 RT 4730-4731.) Riches' death was like losing a family member, and has impacted Hendry's marriage, his attitude toward his job, and his relationships with his children, his co-workers, and God. (24 RT 4733.) His children still talked about Riches, who had come to their house a few times. (24 RT 4733.) They have accompanied Hendry to Riches' gravesite a couple of times, and those are the only occasions when they have seen Hendry cry. (24 RT 4734.) Hendry testified that the 7-Eleven where Riches was killed was a spot that deputies would frequent. (24 RT 4736.) Hendry had trained Riches on the proper method of arriving at an all-night convenience store, which was to arrive with your lights off, keep your eyes on the store because it was well-lit, and determine whether some sort of

commotion or dangerous situation might be taking place inside the store. (24 RT 4737.)

Joseph Hoskins, a Sheriff's Department investigator, testified that he had known Riches for nine years as a co-worker and as a friend. (24 RT 4744-4745.) When they were both new deputies, they worked together at the jail. (24 RT 4747.) On one occasion, they ran over to an inmate who was blue in the face and who appeared to be having a grand mal seizure. (24 RT 4747.) As Hoskins performed CPR on the inmate, Riches stood behind Hoskins, speaking words of encouragement. (24 RT 4748.) Afterwards, Riches told Hoskins that the inmate probably would have died if Hoskins had not acted as he had done. (24 RT 4748.)

Bruce Riches, Deputy Riches' father, testified that his son's death had impacted him greatly, and that he would never get over it. (24 RT 4750-4752.)

Meriel Riches, Deputy Riches' mother, testified that her son, who had suffered brain trauma at birth, had had learning difficulties as a child and later developed dyslexia as well as coordination difficulties. (24 RT 4754-4756.) On one occasion when he was a small child, he climbed up onto a wall wearing a Batman costume, declared that he could fly, and fell to the ground, splitting his chin from ear to ear. (24 RT 4755.) Within half an hour of returning from the hospital, he got up on the wall and tried to fly again, fell to the ground, and tore out all his stitches. (24 RT 4755.) Although his IQ was above average, during his school years he had learning difficulties and coordination problems. (24 RT 4757.) He joined the marching band, and approached the task with great determination, but then, on the eve of a competition, came home crying, saying that he would have to quit because he would hold everyone else back. (24 RT 4756.)

However, he went back the next day and participated in the competition, and his band was declared the winner. (24 RT 4757.) On another occasion, as he was passing the house of an elderly couple on his way to school, he noticed that their chicken coop was in bad shape. (24 RT 4758.) He went back to their house in the evening and asked if he could fix their chicken coop, and, on the following weekend, did so. (24 RT 4758.) When he was 16, he spent his entire summer doing volunteer work for another elderly couple, digging a stairway into the side of the mountain on which they lived. (24 RT 4759.) He brimmed over with love and generosity, and was the son that every parent would dream of having. (24 RT 4759.) Her husband Bruce, who has been clinically depressed since their son's death, never spent a day without crying, and would never be able to go back to work. (24 RT 4759-4760.)

B. The Defense Case.

The defense presented six expert witnesses, including psychiatrist Roderick Pettis, who testified that appellant wass psychotic and that he suffered both from a schizotypal personality disorder and from a major mental illness akin to schizophrenia: delusional disorder, persecutory type.

The defense also presented seven other witnesses who testified as to appellant's disturbed mental and emotional states and behaviors during the months and years prior to the night he shot and killed Deputy Riches.

In addition, the defense called Deputy Andre Spencer, who testified about improprieties in his traffic stop and arrest of appellant on March 28, 1999.

1. Evidence Regarding Appellant's Mental and Emotional Condition.

a. Testimony of Roderick Pettis, M.D.

Roderick Pettis, M.D., a clinical and forensic psychiatrist with prior experience appearing as an expert in both civil and criminal trials,[29] testified that he found this case unique because of the voluminous information from such an abundance of sources. (30 RT 5660-5662, 5664-5667.) As part of his comprehensive forensic evaluation, he interviewed appellant for about eight hours in 2001 and 2002, reviewed all other interviews conducted by others with appellant and with his family, friends, and former school teachers, reviewed appellant's school records and medical records, and reviewed all the police reports as well as the records from the Santa Ana jail.[30] (30 RT 5666.) His task in this case was solely to evaluate appellant for the presence of mental illness.[31] (30 RT 5667.)

Based on his evaluation, Pettis concluded that appellant was psychotic. (30 RT 5668, 5673.) Pettis concluded that, on DSM Axis I, appellant suffered from delusional disorder, persecutory type, a

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[29] Pettis, who completed his residency in psychiatry at Harvard Medical School, testified that in addition to serving as staff psychiatrist for the County of San Francisco, teaching medical students clinical evaluation and assessment, and teaching at conferences around the country, he had performed forensic evaluations for virtually every court panel in Northern California. (30 RT 5662-5663.)

[30] Pettis noted that prior to appellant's first trial, he prepared a 13-page index of the 246 separate items he had reviewed, and that since that time he had reviewed voluminous additional documents. (30 RT 5666-5667.)

[31] Pettis's role did not include treating appellant clinically: he was not asked to do so, and would not have done so even if asked because he would not mix his forensic and clinical roles, which have different goals. (30 RT 5667-5668.) Thus, while he diagnosed appellant as being psychotic, it was not his role to prescribe antipsychotic medication. (30 RT 5668.)

schizophrenic spectrum illness,[32] and that, on Axis II, appellant suffered from a schizotypal personality disorder. (30 RT 5668-5869, 5673.) Pettis testified that although persons with appellant's diagnosis can appear normal until their delusions are triggered, they are as chronically mentally ill as are persons with schizophrenia, but just not as obviously so. (30 RT 5680.) Because they do not have the auditory or visual hallucinations and the disordered thinking usually associated with schizophrenia, they can function satisfactorily and can appear to be coherent, but only so long as their underlying encapsulated delusions are not activated. (30 RT 5676-5680.)

In regard to his Axis II diagnosis of schizotypal personality disorder, Pettis testified that in diagnosing a personality disorder, one looks at a person's longitudinal development starting from childhood, and assesses how character and personality began to form. (30 RT 5680.) The schizotypal personality is characterized by mistrust and suspicion, odd or magical thinking, and difficulty in establishing and maintaining relationships. (30 RT 5680-5681.) Because of their odd or magical thinking, people with schizotypal personality alienate others and become isolated. (30 RT 5681.) Pettis observed this pattern emerge in appellant's life from an early age. (30 RT 5681.) In appellant's school records, everyone described him as being suspicious, mistrustful, and odd. (30 RT 5682.) Pettis identified this as appellant's base personality out of which his major mental illness then developed. (30 RT 5682.) When Pettis interviewed him, appellant told Pettis that he didn't like school from the

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[32] On Axis I, Pettis made a secondary diagnosis of dysthymic (i.e., depressive) disorder. (30 RT 5668, 5709.) He also concluded that appellant additionally suffered from poly substance abuse, which, however, was in remission in his current incarceration. (30 RT 5669.)

start because he couldn't figure out why nobody liked him. (30 RT 5681-5682.) Pettis characterized appellant in the early stage as being "pre-morbid." (30 RT 5682.)

Pettis noted that his forensic evaluation of appellant was very different from a clinical evaluation that he might make of a patient. (30 RT 5682.) With a patient who seeks treatment of his own volition, he would take at face value whatever information the patient might give him, and would make no independent investigation to determine the truthfulness of that information. (30 RT 5682.) With a forensic evaluation, on the other hand, he relied very little on what the person told him. (30 RT 5682.) He regarded it as absolutely essential to get collateral information over the whole life cycle from every sphere that he could find, because the person could be malingering, seeking to fool the psychiatrist in order to get some benefit.[33] (30 RT 5682-5684.)

Pettis drew upon voluminous collateral evidence from appellant's pre-adolescent years. (30 RT 5685.) He reviewed, and incorporated in his evaluation, the reports of two other expert witnesses: Dr. Asarnow's report regarding neurological testing of appellant, and Dr. Missett's report regarding evaluations of other members of appellant's nuclear family. (30 RT 5685-5686.)

Pettis discovered that appellant's father had subjected him to punitive corporal punishment, including severe beatings. (30 RT 5686.) He would make appellant wash out his mouth with soap, beat him with P.V.C. pipes, and, on one occasion, compel him to hold a burning match while it burned

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[33] Pettis noted, however, that appellant, though cooperative during their interview, seemed not interested in talking with Pettis. (30 RT 5684.) In one instance, when Pettis asked him about things that might imply a mental illness, appellant asked what that had to do with anything. (30 RT 5684.)

his fingers. (30 RT 5687.) Appellant's father was often absent from the home. (30 RT 5688.) When present, he drank heavily all day, starting in the morning. (30 RT 5688.)

Appellant's oldest brother, Bobby, teased him and picked on him, beat him, and humiliated him, and when Bobby's friends and those of appellant's second-oldest brother, Mark, visited the house, they would join in teasing and humiliating him. (30 RT 5687.) When interviewed, both Bobby and Mark acknowledged that they had collaborated in abusing appellant because, in their perception, he was weak and vulnerable.[34] (30 RT 5689.) Appellant would whine and cry when they would abuse him, and his response would motivate them to continue their abuse. (30 RT 5689.)

School records showed that, from the start, appellant could not function. (30 RT 5690.) His teachers found him so awkward and immature that they suggested he repeat his kindergarten year. (30 RT 5690.) After his parents declined that recommendation, he was advanced to the first grade, but, still unable to function, had to repeat that grade. (30 RT 5690.) After advancing to the second grade, he had to repeat that year, too. (30 RT 5691.) During his repeat year in the second grade, he did so poorly that the school referred him to see the school psychologist, who determined that he was suffering from feelings of being victimized and vulnerable, and had low self-esteem because of the failures he had already experienced. (30 RT 5691.) When the psychologist referred him to the New England Medical Center for Psychological Testing to be evaluated for possible learning

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[34] Bobby acknowledged that on one occasion he threw a rock at appellant, striking him in the head, and that on another occasion while chopping wood, he intentionally struck appellant's finger. (30 RT 5689-5690.)

disorders, they detected no learning disorders, and recommended instead that he be given psychological counseling.[35] (30 RT 5691.)

Pettis found that appellant's problems persisted through his adolescent years, and worsened during that period when he began using drugs as a means of "self-medicating," i.e., "using a drug to self-treat a psychological problem." (30 RT 5693-5695.) During those years, appellant continued to feel stress and anxiety, experiencing the world as an unsafe place because there was no one to protect him from being abused by his father and his two oldest brothers. (30 RT 5694.) When appellant was 14 years old, someone introduced him to sniffing glue, which reduced his anxiety by numbing him out emotionally. (30 RT 5694.) Within only a few days, appellant became addicted to sniffing glue and, subsequently, to other inhalants, including airplane glue and Pam cooking spray. (30 RT 5694.)

Appellant's parents dealt with appellant's use of inhalants by escalating the beatings. (30 RT 5696.) His father would routinely take him to the basement where no one would be able to hear his screams, and give him such severe beatings with P.V.C. hoses that he would leave welts and marks on his body. (30 RT 5696.) When his brother Mark beat appellant for using inhalants, their mother praised Mark for doing so. (30 RT 5697.)

Between the ages of 14 and 18, appellant continued to self-medicate, utilizing a variety of drugs, including amphetamines, cocaine, and PCP, and

[35] Pettis noted that today someone with appellant's disabilities would be placed in special education classes with teachers who are trained to help troubled children. (30 RT 5692.) Instead, appellant remained in classes with teachers untrained to deal with someone like him, some of whom entered comments in his school records that reflected their frustration with him. (30 RT 5692.) Some remarked only that he was shy, but his fifth grade teacher characterized him as despising authority and as having a stubborn or nasty streak. (30 RT 5692.)

engaging in heavy use of alcohol. (30 RT 5698.) Reports from people who knew appellant during these adolescent years remark upon his suspiciousness, and his belief that other people, including members of his own family, were against him. (30 RT 5700.) No one addressed or even understood his psychological problems or the psychological causes of his academic problems. (30 RT 5701.) His unremitting academic difficulties (despite his not having a learning disorder), and his ensuing humiliations in class when being called upon to read out loud and not being able to, caused appellant to lose interest in school, and to use every opportunity to avoid those humiliations by skipping school. (30 RT 5700-5701.)

Appellant had no friends. (30 RT 5701.) He felt especially awkward and uncomfortable around girls. (30 RT 5701.) Both his psychological and his sexual development were severely arrested. (30 RT 5702.) Both appellant and his brother Scott, wholly unknown to each other at the time, engaged in cross-dressing, secretly wearing their mother's and their sister Annalisa's clothes. (30 RT 5702.) On one occasion, appellant touched Annalisa sexually. (30 RT 5703.) This single incident continued to torment appellant for years throughout his life. (30 RT 5704.) When Pettis interviewed him, appellant was ashamed to tell him about it; and Annalisa reported that even in later years, appellant could never stop apologizing to her for it. (30 RT 5704.) Experiencing guilt about sexuality, appellant developed a pattern of excessive masturbation, which would be followed by extreme feelings of guilt. (30 RT 5706.) An incident traumatic to appellant's sexual development occurred when he was 17 when he masturbated using a vacuum cleaner and got his penis stuck inside the hose. (30 RT 5704.) Paramedics had to be called, and when they arrived, they laughed and smirked at him, and appellant was utterly humiliated. (30

RT 5705.) When someone introduced him to the Bible sometime later, appellant became even guiltier about his masturbating, as well as about his drug use, and focused his attention on passages involving sexuality and cataclysm. (30 RT 5706-5707.)

Nothing changed for the better for appellant during his post-adolescent years, from the time he was 18 until his shooting of Deputy Riches on June 12, 1999. (30 RT 5712-5713.) He had no success in any sphere of life, only an escalation in his paranoia and despair. (30 RT 5713.) His drug use continued. (30 RT 5712.) He could get only low-level labor jobs. (30 RT 5713.)

Other than one possible girlfriend to whom there was a reference in his records, appellant had no relationships with women at all, until he met a prostitute in Mexico named Maribel. (30 RT 5715.) Appellant formed a strong attachment to her, traveled to Mexico frequently to see her, spent a lot of money on her, and asked her to marry him. (30 RT 5715.) When she declined, he became extremely depressed, and when he subsequently happened upon a Bible passage in the Book of Exodus with the words "Prostitute in the Concubine," he did a blood sacrifice, staining that passage in his Bible with his own blood, believing that by doing so, he would get her to change her mind, and accept his offer of marriage. (30 RT 5715-5716, 6570-6572.) Thereafter, he developed a fixation on the idea that "Maribel" was a twin sister who was only pretending to be Maribel, and that the other people in the bar in Mexico where she worked were conspiring with the twin and were lying to appellant and pretending that the twin was actually Maribel. (30 RT 5719.) Later, in 1990, appellant was given the name of a woman in the Philippines, and when he contacted her and received her picture in return, he thought that she looked like Maribel.

(30 RT 5719-5721.) Appellant took this as a sign from God that he should go to the Philippines. (30 RT 5720.) He did so and met the woman, and, feeling that this was what God wanted him to do, he married her while he was there. (30 RT 5720.) During their honeymoon, he told the woman that his parents had hired a private detective to follow every move they made. (30 RT 5720.)

Pettis testified that by this time, appellant's Axis II schizotypal personality organization, characterized by suspiciousness and mistrust, had already ripened into a full-blown Axis I psychotic delusional disorder. (30 RT 5809-5810.)

Pettis traced the development of appellant's full-blown psychosis to the period when appellant lived in Oregon for several years, on property in a remote rural area owned by his sister, Annalisa, and her husband, Mark LaCroix, far from where they lived. (30 RT 5721-5722, 5726, 5810.) Appellant lived alone inside a bunker he had dug underground, kept a lot of guns on the property, and carried guns around with him. (30 RT 5722, 5727.) He told his brother-in-law that people were after him, that he was being followed and surveilled, and that helicopters and fixed-wing aircraft were flying over and watching him.[36] (30 RT 5722.) He kept guns hanging from trees, as well as from his bicycle, and told his brother-in-law that he felt he needed them for self-protection. (30 RT 5726-5727.) One day when his sister Annalisa came to visit him, she found him covered all over in berry juice, which appellant explained by telling her that he was camouflaging himself from planes that were trying to hunt him down. (30 RT 5727.) During part of his time there, appellant lived inside a cave, with no running water or electricity, trying to stay as isolated as possible and

[36] According to the brother-in-law, there was only one sheriff to cover the very large area of their rural county. (30 RT 5722.)

living in such a way as to avoid contact with people, all as a way of responding to his belief that people were after him or against him. (30 RT 5723.)

Pettis testified that appellant continued to express his conspiracy theories and to manifest his paranoia throughout the '90's, although there are indications that his relationship with the woman he had married helped stabilize him a bit. (30 RT 5733-5736.)

Following his initial encounter with Deputy Spencer on March 28, 1999, however, appellant's psychosis changed dramatically for the worse. (30 RT 5736.)[37] In the aftermath of that encounter, appellant told everyone he spoke with that he was now absolutely certain that law enforcement was out to get him and to kill him. (30 RT 5743.) Appellant's condition became progressively worse and worse throughout the ensuing two-and-a-half month period that culminated in his shooting of Deputy Riches on June 12, 1999. (30 RT 5743.)

Pettis, who had reviewed the videotape of the March 28th incident, testified that it was clear that appellant's perception that Spencer fondled him and was sexually inappropriate with him was distorted. (30 RT 5743.) It was appellant's pre-existing heightened sensitivity to sexual inadequacies and public humiliations, harkening back to his cross-dressing, to the incident with the vacuum cleaner, and to his whole history of being sexually ineffectual, that predisposed him to perceive as a sexual assault Spencer's reaching into his shorts and checking near his waistband for concealed drugs. (30 RT 5743-5744.) The trauma was compounded when appellant said, as he was being handcuffed, "Ow, you are hurting me," and

[37] Before Dr. Pettis testified, the penalty phase jury had already heard the testimony of Ralph Pantoni and Deputy Andre Spencer regarding the traffic stops.

a backup officer replied, "We want to hurt you." (30 RT 5746.) That transaction fed directly into appellant's delusional ideation, confirming precisely what he already believed. (30 RT 5746.) The impact on appellant was intensified even further when Spencer and another deputy then went directly to appellant's apartment and searched it. (30 RT 5746.) After that event, appellant's relationship with his wife, which had shown signs of improving, fell apart. (30 RT 5747.)

A second encounter with Deputy Spencer a few weeks later was further destabilizing to appellant, who perceived that the police were now closing in on him. (30 RT 5748-5749.) Instead of telling people, "They are after me," appellant told people, "They are going to kill me." (30 RT 5749.)

Appellant's experience of being singled out to be oppressed fit into the whole pattern of his life. (30 RT 5751.) Highly agitated, he made gestures toward, or attempts at, suicide with spray starch and with rat poison. (30 RT 5750.) His mental deterioration grew out of his heightened fear for his life, not merely from his being constrained, in the aftermath of his March 28th arrest by Deputy Spencer, from using marijuana and his having to attend drug classes. (30 RT 5751.) His adaptation was to try to get away to the mountains; however, he would become highly agitated and distressed whenever he would have to return from the mountains to attend his drug diversion class. (30 RT 5751-5752.) He wanted desperately to avoid any further contacts with law enforcement. (30 RT 5752.) When he would have to wait in traffic at a red light, he would believe that he was being monitored. (30 RT 5752.) Just days before June 12th, he ripped out a coaxial cable at his apartment complex, believing that it was being used to surveil him. (30 RT 5756-5757.) On the morning of June 12th, when he had to return from the mountains to take care of legal obligations from his

March 28th arrest, the very notion of returning made him suicidal. (30 RT 5755.) He ran down the steep mountain in a reckless manner, hoping that he would fall and break his neck. (30 RT 5755-5756.) Appellant's behavior at his apartment complex later that night, yelling and breaking a chair,was consistent with his grossly decompensated state. (30 RT 5758.) He was coming apart at the seams: his psychosis, combined with his despair, had reached an extreme level, and he could not control his behavior.[38] (30 RT 5758-5759.)

Appellant's conduct after shooting Deputy Riches – breaking down the gun, cutting up the shirt he had worn, shaving off his mustache – was in no way inconsistent with his being delusional or with his suffering from an acute mental illness. (30 RT 5761.) Mental illness that has been present for so many years does not simply go away. (30 RT 5762.) Appellant, continuing to show signs of fear and paranoia, wanted to get back to the mountains, away from everything, and was trying to make his escape, hoping that he wouldn't encounter anyone, and that nothing else would happen. (30 RT 5762-5764.)

Pettis testified that he had reviewed all the jail records covering appellant's four-and-a-half years in custody. (30 RT 5770.) Records from the Orange County jail for the six days after the shooting reflect that appellant was a high suicide risk, and that he was noted to be depressed and withdrawn and in need of acute mental health housing. (30 RT 5770-5771.) A single contrary notation from a Dr. Johnson on June 15th indicated that, in Johnson's opinion, appellant did not seem depressed, suicidal, or psychotic, but Pettis has not spoken with Dr. Johnson, and could draw no

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[38] Pettis testified that he had found nothing to indicate that appellant's behavior at the apartment complex that night had to do specifically with his relationship with his wife. (30 RT 5761.)

conclusions from his notation.[39] (30 RT 5772-5773.) Appellant was subsequently transferred to the Huntington Beach jail, and then, in November 1999, to the Santa Ana jail, and a number of notations during his lengthy custody there report that he was acting confused, was absent-minded, seemed out of touch with his surroundings, at times was in a daze, was withdrawn, quiet, reserved, and distant, refused to go out, and slept all day. (30 RT 5774, 31 RT 5850.) There were notations that he refused meals, didn't shower, and had no hygiene. (30 RT 5775.) On February 4, 2000, someone noted that appellant seemed to be in conversation with the TV. (30 RT 5775.) At times appellant would be placed on suicide watch. (30 RT 5776.) There were consistent notations that he would never acknowledge anything mental-health related, and consistently, over the four-and-a-half year period, did not want anyone to think that he had mental health issues. (30 RT 5777.) Pettis noted that this bore on his opinion that appellant had not faked or feigned his mental illness. (30 RT 5777.) There was a notation from January 15, 2000 indicating that appellant told other inmates to plead insanity if they murdered someone, but this didn't mean anything to Pettis because appellant was himself not pleading insanity, and did not even want to talk with Pettis about his mental health issues. (30 RT 5778-5779.) When Pettis interviewed appellant, he saw no evidence that he was malingering. (30 RT 5792.) Additionally, Dr. Asarnow included a battery of tests in his neuropsychological testing that would have detected malingering, and found that there was none. (30 RT 5793.)

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[39] Dr. Johnson's notation also referred ambiguously to someone – whether to appellant, or to other inmates with whom he was conversing, is not clear – who spoke jovially about the officer's being dead. (30 RT 5772.)

Pettis testified that, while appellant's mental illness could have been aggravated by drugs, it was not caused by drugs. (30 RT 5789.) Appellant had periods of actual drug abstinence during his adult years, and showed signs of mental illness even when he was not using drugs, including during the times that Pettis interviewed him in jail a couple of years after he had been incarcerated. (30 RT 5790, 31 RT 6088-6089.) During the period prior to June 12, 1999, appellant had stopped using marijuana in the aftermath of his March 28th arrest, and his blood tests taken within about 12 hours after the shooting showed negative for the presence of marijuana. (31 RT 6090.) During the eight hours that Pettis interviewed appellant in jail, he observed symptoms of appellant's paranoid delusional disorder. (31 RT 6089.) Appellant was guarded in his demeanor and very reticent to be interviewed, even though Pettis had been sent by appellant's own attorneys. (31 RT 6089.) He was hyper-vigilant, looked around frequently, and commented that they were being monitored by microphones. (31 RT 6089.) When on one occasion Pettis was accompanied down the hall to appellant's cell by a jail official, appellant thought that there was some hidden meaning to this and that Pettis couldn't be trusted; and Pettis thought that he might not be able to interview appellant at all that day. (31 RT 6089-6090.)

b. Testimony of Robert Asarnow, Ph.D.

Robert Asarnow, Ph.D., an expert neuropsychologist, testified concerning his neuropsychological evaluation of appellant. (28 RT 5295, 5306.) Asarnow, a professor at UCLA both in the Psychology Department and in the Medical School's Psychiatry Department, and the author or co-author of more than 80 articles in the field of schizophrenia and schizophrenia-spectrum illnesses, had previously testified in numerous civil

cases, and in criminal cases for the prosecution (including two murder trials in San Diego County, one a death penalty case), but had never, prior to his testimony in this case, testified on behalf of a criminal defendant. (28 RT 5285, 5294-5296, 5298.)

Asarnow reviewed all of appellant's school records from kindergarten (age 5) through the 11th grade (age 19), met with him four or five times, spending four or five hours with him on each occasion, and administered a battery of 11 neuropsychological tests designed to assess various behavioral functions associated with particular areas of the brain,[40] as well as two additional tests designed specifically to detect malingering.[41] (28 RT 5300-5308, 5311.)

Asarnow, who had expertise in the fields of child psychology and child neuropsychology,[42] testified that, in general, reviewing school records can be helpful in determining both the onset and the nature of cognitive and emotional difficulties, and that they were significant in his evaluation of appellant. (28 RT 5308-5309, 5311.) Appellant had difficulty from the day he entered school. (28 RT 5313.) In kindergarten, despite having an I.Q. of 115, which was within the normal range, appellant could not do the school work, and received incompletes in all his grades. (28 RT 5313.) There was

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[40] These 11 tests were the Wechsler Adult Intelligence Scale, Peabody Picture Vocabulary Test, Controlled Oral Word Association Test, California Verbal Learning Test, Wisconsin Card Sorting Test, Trail Making A, Trail Making B, Purdue Pegboard Test, Benton Visual Retention Test, Benton Judgment of Line Orientation Test, and Facial Recognition Test. (28 RT 5307-5308.)

[41] These two tests were the Validity Indicator Profile and the Test of Memory Malingering. (28 RT 5308.)

[42] Asarnow previously edited the Journal of Child Neuropsychology, and was the Chief of Child Neuropsychology Services at UCLA. (28 RT 531.)

no indication of any behavior problems, and his conduct was rated as "satisfactory." (28 RT 5313.) He was promoted to the first grade (though against the recommendation of his teachers, as Dr. Pettis noted), where his difficulties continued, with unsatisfactory grades in writing, arithmetic, comprehension, recognizing words, and oral production and retention. (28 RT 5313-5315; 30 RT 5690.) Only his work habits and social habits were graded "satisfactory." (28 RT 5315.) He had to repeat the first grade, despite again testing within the average range on a group I.Q. test, and despite getting grades of "A" in effort and in conduct. (28 RT 5315.) His performance was so poor that he would have been returned to kindergarten if his parents had acceded to the school's recommendation. (28 RT 5316.) When he repeated the first grade, he again tested within the average range in I.Q., and got grades of "C" in his academic subjects and "satisfactory" in work habits and social habits. (28 RT 5316.) There was still no indication of any behavior problems. (28 RT 5316.)

The next year, at age eight, appellant entered second grade, and received grades of "F" in spelling and reading, "D+" in English, penmanship, and reading, and "satisfactory" in conduct. (28 RT 5316-5317.) School records noted that he was clumsy and had very poor motor skills, and that his handwriting was very bad. (28 RT 5317.) Asarnow, noting that appellant's motor skills problem would have caused him frustration in cursive handwriting, testified that neuromotor dysfunction is one of the factors most consistently associated with liability to schizophrenia spectrum disorders. (28 RT 5318.)

The school records also recorded that appellant seemed to be trying harder, but with very little improvement in his work, and that he daydreamed and had difficulty concentrating. (28 RT 5317.) Appellant

repeated the second grade the following year, receiving grades of "C" in all his subjects, but, although his conduct was good, he came to the attention of the school psychologist for his perceptual motor problems. (28 RT 5318.) She referred him to the New England Medical Center at Tufts University for a comprehensive visual perceptual evaluation, where he was diagnosed as having a visual perceptual abnormality. (28 RT 5319-5320.) He was given a full I.Q. test, and scored 90, within the average range. (28 RT 5320-5321.) Noting that appellant's academic problems might be rooted in his perception of himself as weak, small, and a victim, the Medical Center psychologist suggested that he be placed in a special education class. (28 RT 5321.)

Appellant continued to have problems throughout all his years in school until he eventually lost interest in school around the 9th grade, started skipping classes, and finally dropped out after the 11th grade. (28 RT 5322, 5325.) Given his normal intelligence, his academic difficulties were precursors of a range of psychiatric disorders; and his early neuromotor impairments were consistently associated specifically with liability to schizophrenic spectrum disorders. (28 RT 5322-5323.) His conduct remained consistently satisfactory through the 8th grade, although there were indications in the records that, despite his wanting to be with people, he had difficulty forming peer relationships, and was isolated and daydreamed. (28 RT 5323.)

Regarding the battery of neuropsychological tests that he administered to appellant, Asarnow testified that, while he was not asked to render a psychiatric or psychological diagnosis of appellant in this case, the results on a number of the tests were consistent with appellant's suffering

from a schizophrenic spectrum disorder, and indicative of such a disorder. (28 RT 5336, 5344, 5348, 5352, 5354, 5362-5365, 5379-5380.)

The Wechsler Adult Intelligence Scale comprises 11 subtests, and the "full scale" I.Q. is the average of all the subtest scores. (28 RT 5330.) Appellant's full scale I.Q. is 100, which was exactly in the middle of the normal range, and was also in the middle of appellant's childhood I.Q. test results. (28 RT 5331.) While there had been no decrease in appellant's intellectual functioning since childhood,[43] what was striking to Asarnow about the results was the wide variation in scores among the subtests, with many being significantly above or below average. (28 RT 5332-5333.) The anomaly most striking to Asarnow was appellant's score in the 95th percentile on the picture completion subtest, which requires attention to detail, indicating hyper-vigilance, a trait consistent with schizophrenic spectrum disorders and particularly with delusional disorders of a persecutory type. (28 RT 5334-5336, 5365.)

The California Verbal Learning Test involved Asarnow giving appellant a list of words, one at a time, to remember, and then, after a delay, asking him to repeat them back. (28 RT 5341-5342.) Appellant remembered not only the words he had been given, but also additional words that were similar in meaning or category. (28 RT 5342-5344.) This phenomenon of over-generalization, or "flattened stimulus generalization gradient," is seen in some schizophrenic spectrum disorders. (28 RT 5344, 5363.)

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[43] Because appellant's score as an adult was actually higher than it was at ages nine and ten, before his drug use began, there was, therefore, no indication that his intellectual functioning had decreased over the period of time of his drug use. (28 RT 5371.)

On the Wisconsin Card Sorting Test, which evaluates problem-solving skills, appellant scored in the 1st percentile, failing completely. (28 RT 5345-5346.) Someone such as appellant, who scored in the 50th percentile in full scale I.Q., would have been expected to score in the average range. (28 RT 5346.) The test involves the ability to recognize that the rules of the game have changed, and to adapt accordingly by utilizing corrective feedback to alter one's hypothesis. (28 RT 5347-5348.) Appellant, unable to incorporate corrective feedback at all, perseverated in his original hypothesis, a pattern found in persons with schizophrenic spectrum disorders. (28 RT 5348-5350, 5364.)

On Trail Making A, appellant scored in the 60th percentile, which was consistent with his general intellectual functioning. (28 RT 5350-5351.) However, on Trail Making B, which makes additional demands of flexibly switching attention, and is "the single best predictor of whether someone came from a family of a patient with schizophrenia," he scored in the 1st percentile, a highly sensitive indicator of liability to schizophrenia or schizophrenic spectrum disorders. (28 RT 5350-5352, 5364.)

On the Purdue Pegboard Test, appellant performed in the 5th percentile using his left hand, and in the 10th percentile using his right hand. (28 RT 5352-5354.) On the Digits Symbol Coding subtest of the Wechsler Adult Intelligence Scale, he scored in the 9th percentile. (28 RT 5353-5354.) These results reflect a vestige of the motor problems that appellant first manifested in childhood, and are also consistent with schizophrenic spectrum disorders. (28 RT 5354, 5365.)

Asarnow testified that malingering could be categorically excluded as a possible explanation for appellant's performance on these tests, because

two additional tests he administered, the Validity Indicator Profile and the Test of Memory Malingering, were designed specifically to detect it, and appellant showed absolutely no evidence of malingering. (28 RT 5308, 5372-5375.)

c. Testimony of James Missett, M.D.

James Missett, M.D., a psychiatrist on the clinical faculty at Stanford Medical School and the Director of its Center for Psychiatry in the Law, testified about his analysis of appellant's family dynamics, his clinical evaluations and diagnoses of five family members, and his findings of pathologies in common shared among them. (29 RT 5518-5519, 5528, 5530, 5533.) Missett, who was board certified both in psychiatry and in forensic psychiatry, previously qualified as an expert more than a thousand times in state and federal court in both civil and criminal cases, where he appeared as often for the prosecution as for the defense.[44] (29 RT 5521, 5523-5525.)

The five family members for whom Missett made clinical evaluations and diagnoses were appellant's father Robert Steskal, Sr., his mother Joyce Steskal, his oldest brother Bobby (Robert Steskal, Jr.), his younger brother Scott Steskal, and his sister Annalisa LaCroix. (29 RT 5533.) He was not asked to make an evaluation or diagnosis of appellant, and did not do so.[45] (29 RT 5529.) He personally interviewed the five family members, reviewed transcripts of interviews with them conducted

[44] Missett testified that he had also served as a consultant to about a dozen police agencies in the Bay Area, to District Attorneys in about six counties, to the offices of the State Attorney General and of a U.S. Attorney, and to the U.S. Secret Service. (29 RT 5523.)

[45] Missett also did not interview appellant's older sibling Mark and youngest sibling Chris. (29 RT 5616.) When Chris was born, the eldest sibling, Bobby, was 11, Mark was 10, appellant was 8, Scott was 6, and Annalisa, the only sister, was 4. (29 RT 5616.)

both by the Sheriff's Department and by the Public Defender's office, and reviewed school records for Bobby, Scott, and Annalisa. (29 RT 5534.)

Missett's purpose in analyzing appellant's family dynamics and in evaluating and diagnosing his family members was to provide helpful information for a psychiatric evaluation and diagnosis of appellant, and to indicate whether particular pathologies were genetic or environmental in origin, or a combination of both. (29 RT 5530.)

Missett interviewed Robert Steskal, Sr., for three hours on December 29, 2000. (29 RT 5548.) Steskal reported to Missett that he was both suspicious of, and confrontational toward, authority; that he never had a good feeling about the law; and that the law was either bad, or was lined up against him. (29 RT 5564, 5566.) His basic attitude was that those in authority took advantage of people just for the sport of it.[46] (29 RT 5564.) He was the disciplinarian in the family, and all three of his children whom Missett interviewed talked about his physical abusiveness, including his use of plastic pipes, bats, and other instruments to whip them. (29 RT 5571.) The children had been very much afraid of him, and Missett was told of their having had to hold matches until their fingers burned, being hit on their fingers with a hammer, and being punched in the stomach. (29 RT 5572-5574.) He had problems with alcohol abuse, and would become angry and have outbursts when he drank, and his use of alcohol was reflected in his abusiveness toward his children. (29 RT 5549, 5553 5557.) Missett's Axis II diagnosis was that Robert Steskal, Sr., had a personality disorder with paranoid, schizoid, narcissistic, and obsessive-compulsive features. (29 RT 5558-5563.)

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[46] Annalisa told Missett that her father had always felt slighted in the workplace, and that his attitude was, "They are out to get us." (29 RT 5567.)

Missett interviewed Joyce Steskal for about five hours on March 6, 2001. (29 RT 5576.) She told Missett that she had been sufficiently abusive in raising her children that, by today's standards, they would be taken away from her. (29 RT 5578.) When appellant was in a drug and alcohol rehabilitation program at age 14, she was scolded by people at the program for having beaten him, and her response at the time was to tell them that she didn't know what else to do. (29 RT 5578.) In his Axis II diagnosis, Missett found indications that appellant's mother had a personality disorder. (29 RT 5577.) Missett commented that he did not believe that either she or her husband were evil people, or that they had intentionally set out to hurt their children or to disable them. (29 RT 5579.)

Missett interviewed Bobby Steskal, appellant's oldest brother, for four-and-a-half hours on January 16, 2002. (29 RT 5581-5582.) Bobby reported that as a child he experienced physical abuse by both parents, and that one result was that he became physically and emotionally abusive of his younger siblings, especially appellant and Scott, and that he engaged in antisocial acts in late childhood and early adolescence. (29 RT 5582-5583.) Appellant became the primary focus of Bobby's abuse for about eight years, beginning when appellant was four years old. (29 RT 5583.) He singled out appellant because he perceived him to be weak, vulnerable, and an easy mark. (29 RT 5583.) He acknowledged that when he struck appellant's finger while he was chopping wood, he did so intentionally. (29 RT 5584-5585.) He also acknowledged that he sexually abused his sister Annalisa. (29 RT 5586.) In Missett's opinion, Bobby had a conduct disorder during childhood and adolescence, was a bully, was intentionally cruel, and repeatedly violated the rights of others. (29 RT 5588-5589.) His Axis II diagnosis was that Bobby has a personality disorder with paranoid features,

essentially the same diagnosis as that for his father, Robert Steskal, Sr.[47] (29 RT 5591.) As the eldest child, his mirroring the father's behavior had a significant impact on the younger siblings, shaping their milieu, and establishing an atmosphere of fear and suspicion with respect to authority. (29 RT 5587, 5591, 5593.)

Missett interviewed Scott Steskal, who was two years younger than appellant, for five hours on February 11, 2002. (29 RT 5595.) Of the five family members whom Missett clinically evaluated, Scott was the most psychiatrically troubled, and was the only one who gave evidence of being actually psychotic. (29 RT 5608.) Indications from the interview and from his school records were that he had had a conduct disorder as a child and adolescent, had been both paranoid and depressed for long periods of his life, and had repeatedly thought of suicide. (29 RT 5596-5597.) His depression began in the 7th or 8th grade, and got worse when he was in his 20's. (29 RT 5598.) When he and appellant lived together as adults, they had long discussions about Armageddon and the end of the world, and at one point they actually discussed shooting each other. (29 RT 5597-5598.) Scott had a firm, fixed belief that he was being followed, and that there were forces around him that intended to harm him. (29 RT 5598.) He believed that he and appellant were both being followed, that the reason for it was that their father was associated in some way with the CIA, and that cows with sensors had been used to track their movements. (29 RT 5603.)

On Axis I, Missett diagnosed Scott Steskal as having a delusional disorder, persecutory type, and on Axis II, paranoid personality disorder. (29 RT 5598, 5607.) Missett also reached the conclusion that Scott had a

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[47] Bobby reported to Missett that his own suspiciousness of the police had come from his father. (29 RT 5565.)

shared delusional disorder, and that the person with whom he shared that delusional disorder was appellant.[48] (29 RT 5606-5607.)

Missett interviewed Annalisa for four hours on October 6, 2001. (29 RT 5608.) Missett learned that she had been physically abused by both parents and sexually abused by all four of her older brothers, Bobby, Mark, appellant, and Scott. (29 RT 5609, 5626.) Although she had a history of alcohol abuse and some marijuana abuse, Missett found no indications, on Axis I or Axis II, of any psychiatric condition or personality disorder. (29 RT 5609.)

d. Testimony of Mark Cunningham, Ph.D.

Mark Cunningham, Ph.D., a clinical psychologist who was board certified in forensic psychology, testified that he had been asked by the defense to review all the information in this case, and to determine how it all fit together: how the disparate pieces of information illuminate how appellant came to commit this crime.[49] (33 RT 6306, 6308, 6317.) Cunningham, who was licensed in 11 states, previously testified as an expert in state and federal courts, for both prosecution and defense, on more than 200 occasions. (33 RT 6309-6310.)

In preparing to testify in this case, Cunningham reviewed the reports of Dr. Pettis, Dr. Asarnow, and Dr. Missett. (33 RT 6314.) In addition, he reviewed appellant's school and jail records, his criminal record, and records having to do with the shooting of Deputy Riches, including

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[48] Missett testified that he was able to reach that conclusion, despite not having done a clinical interview with appellant himself, based on what he had heard from Scott and from other people as well, who reported about beliefs that both Scott and appellant jointly held. (29 RT 5607.)

[49] Cunningham stated that if he had not found that the information fit together in an understandable way, he would have declined to testify. (33 RT 6317.)

transcripts and summaries of interviews conducted by both the police and by the defense. (33 RT 6314-6316.) He relied entirely on these records, and did not personally interview anyone, including appellant. (33 RT 6316.)

In his evaluation of this case, Cunningham formed the opinion that appellant was deficient across a number of primary life-functioning areas, is ill, and was an impaired person. (33 RT 6319.) Specifically, appellant was socially impaired, developmentally impaired, psychologically impaired, and neuropsychologically impaired. (33 RT 6320.)

In neuropsychological terms, the processes of appellant's brain have functioned in a faulty way since childhood. (33 RT 6320.) Regarding his school performance, Cunningham noted that his siblings Scott and Annalisa had problems that were extraordinarily similar, which suggests a common genetic, or hereditary, disruption in perception or learning abilities. (33 RT 6322-6323. Appellant's problems with concentration and attention, as revealed in his employment history as well as in his school records, arose from his neurological malfunctioning. (33 RT 6221, 6225.)

From a developmental standpoint, appellant, neurologically impaired as he was, found himself in a family in which the marriage was dysfunctional, the father was an alcoholic who was emotionally absent, sexuality among the siblings was perverse, his disciplining by his parents was abusive, and, additionally, he was brutalized by his eldest sibling and not protected by his parents or by anyone else. (33 RT 6227-6230.) In response, he felt victimized and became passive and depressed. (33 RT 6228-6229.)

From a social standpoint, appellant, throughout his entire childhood, did not know how to relate to other people, was not attuned to the social reciprocity of interpersonal relationships, and was isolated by, and alienated

from, his peers. (33 RT 6331.) His ongoing impairment manifested in his male-female experiences throughout his teenage years and his adult life. (33 RT 6332-6335.) His difficulty relating with people, beginning in early childhood, reflects a psychological disorder with a biological basis. (33 RT 6226.)

From a psychological standpoint, from his teenage years onward appellant was depressed, self-medicated with alcohol and drugs, and exhibited paranoia, and his personality structure was profoundly impaired. (33 RT 6336.)

e. Testimony of Kris Mohandie, Ph.D.

Kris Mohandie, Ph.D., a licensed psychologist with a specialization as a police psychologist, testified regarding the state of autonomic arousal known as the "fight or flight" response. (28 RT 5465, 5471.) Mohandie had previously testified as an expert in five cases, all on behalf of the prosecution, and worked full-time for the Los Angeles Police Department from 1989 until just months before this court appearance. (28 RT 5465, 5467.) In his work for the LAPD, he served as a consultant to the SWAT hostage negotiation team and provided therapy to officers and their families after shooting incidents. (28 RT 5468.) Other than appearing in behalf of appellant, he had never testified for the defense. (28 RT 5467.) In this case, he reviewed only the videotape from the 7-Eleven store. (28 RT 5471.)

Mohandie testified that the fight or flight response is a normal psychophysiological response that involves a large degree of fear. (28 RT 5471-5472.) Someone with this response would actually be afraid even before they are cognitively aware of their fear, because upon an initial perception of something that is threatening, the body reacts in automatic

response patterns. (28 RT 5472.) One of the first things that happens is that the adrenal glands activate, causing quantities of adrenaline to pour into the body's system. (28 RT 5473.) As one consequence, the heart rate speeds up, enhancing both strength and stress, and enabling the person to respond quickly. (28 RT 5473.) The body goes on full alert. (28 RT 5474.) One physiological change is that tunnel vision ensues: instead of seeing the big picture, perception narrows to focus directly on the threat. (28 RT 5474-5475.) With tunnel vision comes cognitive restriction: the person focuses on the perceived threat, and loses a lot of peripheral information. (28 RT 5475.) This is a whole-body response, and what the person sees, hears, and thinks are all affected. (28 RT 5477.) As a result, misperceptions and distortions of reality are the norm, and normal decision-making processes are short-circuited. (28 RT 5475, 5478.) This mechanism is both automatic, and uncontrollable. (28 RT 5478.)

With training, people who encounter fear regularly, such as police and fire personnel, can sometimes mediate this process to some extent; but for an untrained person, it is just automatic. (28 RT 5479.) The mechanism arises regardless whether the initial perception giving rise to it is real or imagined. (28 RT 5479.) Factors that would affect an individual's response are: training and experience, mental rehearsal, previous life experiences including past traumatic events, and overall psychological state. (28 RT 5482.) Another factor is hyper-vigilance, a function of a paranoid state in which an individual is in a state of fight or flight continuously. (28 RT 5482.) Hyper-vigilance means that an individual is primed to over-respond. (28 RT 5482.) "Primed," in this sense, means that the person is not starting from a normal baseline level, but is already one level up. (29 RT 5483.) For such a person, who is in a continuous state of fight or flight, adrenaline

is continuously being dumped into their system. (28 RT 5483.) This causes a depletion of substances, such as serotonin, dopamine, and noradrenaline, that normally would regulate their emotional responses, making it more likely that the person will over-react to the situation. (28 RT 5483.) In sum, a person's psychological state is a crucial factor. (28 RT 5484.) A psychologically-impaired person's perception would be exaggerated, and his response exacerbated. (28 RT 5484.)

f. Testimony of David Smith, M.D.

David Smith, M.D., a physician with a specialty in addiction medicine, testified about the process of making a differential diagnosis to determine whether someone such as appellant suffers from mental illness alone, from drug use alone, or from both.[50] (27 RT 5228, 5241.) Smith testified that he has previously testified as an expert in the area of addiction medicine more than 300 times, and has testified for the prosecution about as often as for the defense. (27 RT 5234-5236.) In his preparation for this case, he had never met with appellant, and had not reviewed any materials pertaining to him. (27 RT 5240, 5276.)

In a person who has no predisposition to psychiatric disorder, drugs cannot cause a permanent schizophrenic spectrum illness. (27 RT 5280.) While marijuana does not itself cause mental illness, it can precipitate mental illness in someone already predisposed; but even a heavy user who stops won't have psychotic symptoms anymore, unless there is an underlying mental illness independent of the marijuana use. (27 RT 5256-5257.) It would be possible for marijuana to be detected in the blood of a

[50] Smith, the founder of the Haight Ashbury Clinic in San Francisco, was a professor at the University of California San Francisco Medical School, a director of the California Department of Alcohol and Drug Programs, and a medical consultant to the Betty Ford Center's Professional Recovery Program. (27 RT 5229.)

heavy user for up to seven days. (27 RT 5247.) If drugs are removed over a period of time and the psychotic symptomatology persists, then it is clear that this is a mentally ill person who had also been using drugs. (27 RT 5280.) As a general guideline in treatment, after a month of abstinence, the symptoms from drug intoxication will fade, and only symptoms of an underlying psychopathology will remain. (27 RT 5245.)

The symptomatology from drug use can mimic the symptomatology of a mental illness. (27 RT 5243.) For example, a patient who has schizophrenia and another patient who has abused a drug like methamphetamine might each display a paranoid schizophrenic-like reaction. (27 RT 5243.) The patients would look the same, the dysfunction in the brain would be the same, brain scans would show the same disruption in the brain, and treatment with dopamine receptor antagonists, such as Thorazine, would be the same. (27 RT 5244.) There are drugs that mimic paranoid delusional disorder, and the worst are methamphetamine, cocaine, and P.C.P. (27 RT 5252-5253.) Marijuana, however, does not do so. (27 RT 5253.) Marijuana might precipitate a pre-existing condition, but marijuana intoxication itself does not mimic paranoid delusional disorder. (27 RT 5253.)

Someone who falls within a schizophrenic-type spectrum disorder would be disposed to drug use, and Smith would expect someone who suffers from paranoid delusional disorder to self-medicate with marijuana. (27 RT 5252, 5254.) It would, to some degree, alleviate part of their anxiety, and, thus, make them feel better. (27 RT 5254.) Self-medicating is the use of a psychoactive drug that initially relieves psychiatric symptomatology, but it then becomes a problem of addiction in and of itself. (27 RT 5247.) Addiction is not a matter of choice: it is driven by the

reward system of the brain, and is characterized by compulsion, loss of control, and continued use in spite of adverse circumstances. (27 RT 5248.) The mentally ill person does not have the judgment or thought process to recognize the initiation of the addiction cycle. (27 RT 5249.) Once the addiction cycle is started after the first fix, or drink, or pill, the self-medicator has no control over it. (27 RT 5248.)

In making a differential diagnosis, the patient's history is of prime importance, including his school records, any anecdotal evidence about his behavior prior to the onset of symptomatology, and any history and anecdotal evidence pertaining to family members who demonstrate similarity to the patient. (27 RT 5279-5280.)

g. Testimony of fact witnesses.

Appellant's oldest brother, Robert Steskal, Jr. ("Bobby"), testified about the dysfunctionality of the family home when he was growing up, his abuse of appellant during that period, and his own difficulties in later life. (25 RT 4879.)

Robert Steskal characterized his father as an alcoholic, both at that time, and to the present day, who worked hard to provide for the family, but was domineering, authoritarian, severe, and very punishing, and lacked skills in relating to his children. (25 RT 4883-4884, 4886.) He was seldom home, and drank beer and hard alcohol whenever he was there. (25 RT 4884, 4886.) His primary role was that of disciplinarian. (25 RT 4885.) On separate occasions when Steskal got into trouble at school in the 4th and 5th grades, his father punched him in the stomach, took him to the basement and made him put a finger on the flat portion of a vice and hit him on the fingernail with a hammer, and, using a hard rubber hose, beat him repeatedly with great force on the legs and buttocks. (25 RT 4896-

4899.) On another occasion, he ordered Steskal and his brother Mark to stand side by side in the kitchen, made them each hold a match, told them that if they dropped their match, he would punch them in the stomach, then lit the matches, forced them to hold them while their fingers burned, and asked them, "Do you believe I will kill you?" (25 RT 4900-4901.)

Robert Steskal's problems at school began by the 3rd grade, and he subsequently was held back for one or two years. (25 RT 4909.) He ran away from home on at least four occasions, the first time when he was in the 4th grade. (25 RT 4911.) He got into trouble for not doing his school work, for fighting with other kids, and for hitting his teachers. (25 RT 4909-4910.) He testified that he was a bully. (25 RT 4916.) Within his family, he sexually molested his sister Annalisa, but the person he especially singled out for constant physical and emotional abuse was appellant. (25 RT 4917-4920.) He did this continuously from the time that he was 7 and appellant was 3 until he was 15 and appellant was 11 or 12. (25 RT 4919.) Mark frequently participated, too, but Steskal was always the instigator. (25 RT 4920.) On one occasion when appellant was only 3, he was helping Steskal who was using a plugged double-barrel .12 gauge shotgun to knock pieces of wood from the top of a rotten stump. (25 RT 4927.) Appellant would sweep away the wood chips with his bare hand. (25 RT 4927.) Steskal intentionally struck appellant's hand with the shotgun, causing him to be taken to a hospital. (25 RT 4927.) Appellant was an easy mark because he was sensitive, quiet, introverted, vulnerable, weak, and emotionally soft. (25 RT 4922-4924.) Steskal's goal was to break appellant down to the point that he would burst into tears and run to their mother for protection. (25 RT 4926.) Steskal testified that he got self-gratification out of doing so. (25 RT 4925.)

Robert Steskal testified that he started using drugs when he was 15, has abused marijuana, cocaine, LSD, PCP, methamphetamine, and other illegal substances, and has had an ongoing alcohol problem since he was 19. (25 RT 4888-4890.)

Robert Eeg testified that he first met appellant in 1985 when appellant was 24 or 25. (28 RT 5442.) At that time, Eeg owned and operated a business in Laguna Hills building sailboats. (28 RT 5442.) Appellant's father, who had purchased a boat from Eeg, arranged for Eeg to hire both appellant and his brother Scott to do menial labor for him for $6 per hour. (28 RT 5442-5444.) They continued to work for him for seven years until he laid them off during a recession in the boat-building business in 1992. (28 RT 5444, 5447.) Unable to afford to rent an apartment during the first year, appellant and Scott lived on the roof of the building, using sleeping bags and tarps. (28 RT 5445-5446.) They had a key to the shop so that they could use the restrooms and have a place to store their belongings, and during that entire time, they never betrayed Eeg's trust. (28 RT 5446.) Appellant, who was paid each week, took his salary in cash because he did not trust banks. (28 RT 5445.) After a year or so, appellant and Scott had saved enough money to buy an old van, and for the rest of the time they worked for Eeg, they lived in their van in the parking lot outside the shop. (28 RT 5447.)

Eeg found appellant to be a very nice, very gentle person, and a very loyal and dedicated employee, who worked hard, was reliable, and never goofed off.[51] (28 RT 5447-5448.) However, he lacked common sense, needed to have every job explained, and was unable to understand very simple things. (28 RT 5447-5448.) He was paranoid, and had to be

[51] Eeg noted that during the entire time they worked for him, he never saw either appellant or Scott use alcohol or drugs. (28 RT 5453.)

carefully handled and directed. (28 RT 5448-5449.) He would be devastated by constructive criticism, would take it as a personal attack, would shut down as if he had been hit by a baseball bat, would just look at the floor and tremble, and would become moody and angry, stew about it, and not talk to anybody for weeks at a time. (28 RT 5449-5551.) He had no social skills with the other eight or nine employees, and was never "one of the guys." (28 RT 5451-5452.) He was a loner, and, other than Scott, kept entirely to himself, and had no social life at all. (28 RT 5451-5452.) Scott functioned as appellant's "handler," and when Eeg needed to give appellant instructions, he would have to go through Scott. (28 RT 5448. 5453.)

From the first week that appellant worked for him, Eeg considered him to be extremely paranoid. (28 RT 5454.) He was constantly looking around, worried about nothing in particular, but apprehensive about the Orange County Sheriff's Department, and about banks, authority, and society in general. (28 RT 5454-5455.) Several times each year he would tell Eeg that he was being hassled, and constantly followed, by the Sheriff's Department, that they were after him, that he was afraid of them, and that he just wanted to keep away from them and stay out of trouble. (28 RT 5455.) Eeg came to work one day and found appellant holding an AK-47 in his hand. (28 RT 5456.) He asked appellant what he needed it for, and appellant replied that he needed it for protection because the law was after him. (28 RT 5456.) Thereafter, he kept the AK-47 with him constantly. (28 RT 5456.) He had it with him every minute, and even slept with it. (28 RT 5456.) When he slept on the roof, he kept it in his sleeping bag with him, and when he slept in the van, he kept it in the van with him. (28 RT 5457.) His conviction that the Sheriff's Department, or the government,

was out to get him was a constant, consistent theme that was present every day, and never ceased. (28 RT 5457.) Appellant would say that he hated the law enforcement that was hassling him, but never would say that he wanted to get even with them, only that he wanted to be safe from them. (28 RT 5457.)

Appellant's sister, Annalisa LaCroix, testified that for two-and-a-half years during the '90's, appellant lived alone in an isolated location in the Rogue River region of Oregon on 100 acres of land her husband co-owned, the site of an abandoned mining operation. (34 RT 6482, 6510-6511, 6513, 6517.) The site had no running water, no electricity, and no buildings other than a windowless concrete bunker about the size of a bathroom. (34 RT 6513-6515.) Appellant remained there by himself for the entire time. (34 RT 6513.)

LaCroix, who lived with her husband about 15 or 20 miles away, would visit appellant about twice a month. (34 RT 6520.) She never saw anyone else there, other than the person who lived at the front of the property, and as far as she knew, appellant never had friends or other visitors. (34 RT 6517, 6520.) On one occasion, she observed him digging a tunnel near the bunker, and he told her he needed it to escape from the people he believed were watching him, and following him, from within the neighboring woods. (34 RT 6519.) Every day, he would dig about ten feet of tunnel with a pickaxe. (34 RT 6519.) He said other things that indicated to her that he might be paranoid. (34 RT 6520.) He told her that TV sets were built with cameras inside that them that can watch you. (34 RT 6520.) She tried to reason with him, but got nowhere. (34 RT 6521.) He told her that the police were watching him, and complained that he had had over 90 such contacts. (34 RT 6522-6523.) To her knowledge, there were not a lot

of police in the area, and she never saw any police officers, or any planes or helicopters from the site. (34 RT 6520.) When she visited on one occasion, she found appellant with purple stains all over his hands, arms, and face. (34 RT 6523.) He told her that he had camouflaged himself so that he could run through the woods at night and find the people who were hidden there. (34 RT 6523.) She would see guns in and around the bunker, including under his bed. (34 RT 6524-6525.) He would walk around the property holding a gun. (34 RT 6524.) When he would ride his bike to her house, he would carry his guns with him inside a bag. (34 RT 6524.) During this time, appellant was neither smoking nor growing marijuana. (34 RT 6517.)

Dave Rodering testified that he met appellant in 1995 when he traveled from Orange County to Oregon to see his friends, Annalisa LaCroix and her husband, and visited the land where appellant was living by himself in a remote area with no heat, running water, or bathing facilities. (27 RT 5192-5193, 5201.) Thereafter, in 1998 or 1999, appellant worked for Rodering in Orange County on a part-time basis, doing manual farm labor and delivering crops to restaurants. (27 RT 5193-5194.) Appellant was the hardest working employee that Rodering ever had, but he had difficulty following directions, and would often take a very long time to complete tasks. (27 RT 5194-5195.)

One day in 1999, appellant showed up for work very upset, with a bruise on his forehead, and told Rodering about a police encounter he had had. (27 RT 5195.) He said that he had been beaten by several officers, and had been physically searched in public. (27 RT 5195.) He said that some of his clothing had been removed, and that his genital area had been examined in public, in full view of other people. (27 RT 5196.) His voice

quavering, his body shaking, he said, "How can this happen? Can they do this to me?" (27 RT 5196.) He appeared to be utterly humiliated. (27 RT 5196.)

Some weeks later, appellant, shaking intermittently and seeming on the verge of tears, began telling Rodering about a second police encounter. (27 RT 5197-5198.) He talked about being watched and followed by the police, and indicated that the police were planning, and trying, to kill him. (27 RT 5198.) He was very fearful, and seemed truly to believe what he was saying. (27 RT 5198.) Once again, his voice would quaver, his body would shake, and he would burst into tears and say, "They are going to kill me, they are going to kill me." (27 RT 5199.) He told Rodering that the police were watching him via satellites and on his TV. (27 RT 5199.) Rodering felt that appellant was falling apart mentally and emotionally, and was possibly having a nervous breakdown. (27 RT 5199.) He had never seen appellant acting like this before. (27 RT 5200.) After the first episode, Rodering had thought that everything would blow over, but after the second episode, appellant was no longer making any sense, and was no longer capable of working for him. (27 RT 5199-5200.)

Rodering testified that appellant seemed sincere in believing that he was going to die at the hands of the police, but never said anything about wanting revenge, or wanting to hurt the police, or wanting to get even with them for what they were doing to him. (27 RT 5200.)

Ralph Pantoni testified that when he met appellant in Lake Forest in November 1998, he was homeless, and was scavenging inside a dumpster. (25 4766-4767.) Appellant walked up, struck up a conversation, told Pantoni not to worry, gave him a dollar, and suggested that he could earn money by doing reclamation mining with him. (25 RT 4768-4769.)

Appellant took Pantoni home for dinner with him and his wife Nannette, and showed him stones that he had brought back from his mining site in the mountains. (25 RT 4769-4770.) Pantoni thought that appellant seemed to be a little paranoid, but they established a working relationship, and appellant became Pantoni's only friend. (25 RT 4770-4772.) Over the next seven months, until the shooting of Deputy Riches, they went to appellant's mountain mining site about 15 to 20 times. (25 RT 4773, 4780.) Appellant provided Pantoni a separate tent, and on each trip, they stayed at the site for four full days, were together the entire time, and formed a relationship like brothers. (25 RT 4780, 4786, 4788.) When they would leave the mountain and return to Lake Forest, appellant would buy food and beer for the two of them, and they would have a meal at his apartment. (25 RT 4776.) Appellant and Nannette were separated by mutual agreement, and, for the most part, appellant lived inside his car, parked outside the apartment; however, when it rained or was very cold, Nannette would invite appellant to stay inside the apartment. (25 RT 4781-4782.) She was dating other men, which upset appellant, but he didn't want her to stop doing so on his account. (25 RT 4782-4783.)

Pantoni noticed that appellant's demeanor was different in Lake Forest than on the mountain. (25 RT 4793.) In Lake Forest, he was nervous and fearful, but on the mountain, at least at first, he was tranquil and peaceful. (25 RT 4793.) The site was a mile-and-a-half from the nearest road, had no electricity, and was desolate. (25 RT 4784-4785, 4787.) Appellant was more involved in the mining operation than Pantoni, and did most of the work while Pantoni relaxed and enjoyed the scenery. (25 RT 4790-4791.) Pantoni found it spooky at night because of scorpions and rattlesnakes; and appellant kept a shotgun and a .22 pistol for protection

from the mountain lions. (25 RT 4792.) Appellant did not talk about guns a lot, and Pantoni never saw any guns at the apartment. (25 RT 4792-4793.) Appellant talked a lot about the Bible, particularly about Armageddon and the Apocalypse, and told Pantoni that the End of Times was "the real deal." (25 RT 4799-4800.) He was paranoid, talked about governmental conspiracies, and believed that when he was in Lake Forest he was being monitored with spy technology in the TV set, that he was being wiretapped and videotaped, and that he was constantly being surveilled by cameras. (25 RT 4807-4810, 4813-4815.) Hé also thought that his parents were having him followed. (25 RT 4811.) In the aftermath of his first encounter with Deputy Spencer, when Spencer went inside the apartment and searched it, appellant believed that Nannette was involved in the conspiracy against him, and was informing on him. (25 RT 4812-4813.) He mentioned suicide 20 to 30 times during the seven months that Pantoni knew him, and actually put a firearm in his mouth on five or six occasions. (25 RT 4804-4805, 4873.) Appellant's first mention of suicide preceded the first encounter with Deputy Spencer, but after that encounter, his talk of suicide became more serious, and he would put the shotgun in his mouth, try to inhale hairspray, and try to drink Drano. (25 RT 4805-4806.)

After the first encounter with Deputy Spencer, appellant's paranoia so intensified that, to Pantoni, it was like a "day and night" change. (25 RT 4823.) Appellant told Pantoni that he had been subjected to a strip search across the street from where he lived, and said that Spencer had used a latex glove to search his privates and had massaged and fondled him in what he believed was a sexual gesture. (25 RT 4819-4820.) He said that after it happened, his pants fell down; that when he tried to pick them up, he was

jumped from behind and had a knee put in his back; that when he turned around, there was nobody there; and that the three or four officers who were at the scene were laughing at him, as if it were a joke. (25 RT 4821.) Appellant felt violated, and no longer felt safe inside his apartment. (25 RT 4823.) He appeared to be very depressed, looked as if he were in a daze, and didn't seem to be all there. (25 RT 4824.) He began having nightmares and, even on the mountain, would wake up screaming in the middle of the night,[52] and would cry out, "You can't do this. Don't do this to me." (25 RT 4824, 4826-4827.) His intake of alcohol increased two- or three-fold. (25 RT 4830.) Pantoni believed that appellant was starting to crack up. (25 RT 4828.)

Pantoni was a passenger in appellant's car when the second incident with Deputy Spencer occurred, about three weeks after the initial one. (25 RT 4833-4834.) As they were riding in Lake Forest, appellant noticed Spencer driving a patrol car in the opposite direction. (25 RT 4835-4836.) Appellant said, "Oh, shit, he is going to pull us over," and Pantoni replied, "Nah, he isn't. Don't get paranoid. Relax. He ain't going to come our way, he is going the other way." (25 RT 4838-4839.) Appellant was positive that they would be pulled over, and, indeed, Spencer turned around, came after them, put on his overhead lights, and pulled them over. (25 RT 4839.) Spencer came up to the driver's window and asked appellant, "Did you take care of that situation from the other week?" (25 RT 4841.) It seemed to Pantoni that Spencer was mocking appellant in a bully-like way. (25 RT 4842.) Thereafter, appellant would bring up Spencer's name every time they spoke about anything. (25 RT 4848.) Pantoni told appellant that if he couldn't find tranquility, even in the mountains, he needed professional

[52] Pantoni testified that their tents were pitched about six feet apart. (25 RT 4826.)

help. (25 RT 4849.) Appellant blew up at Pantoni, cried, and told him that it might be better if Pantoni didn't come there with him anymore so that they could remain friends. (25 RT 4850.) Pantoni was with appellant subsequently when appellant, thinking that the coaxial box in the laundry room adjacent to his apartment was being used to surveil him, ripped out the box and tore all four cables apart. (25 RT 4851-4852.)

Pantoni testified that appellant had been smoking marijuana almost daily since he met him, but that after the first incident with Deputy Spencer and his subsequent court appearance, he stopped completely, fearing that if he were tested, he would lose his license. (25 RT 4859-4861.) Appellant felt that this was an infringement of his rights, but he never said anything about getting even with the police or with Spencer, or that he was going to kill an officer. (25 RT 4873.) The only person appellant threatened to harm was himself. (25 RT 4853.)

Jocelyn Avendano testified that she first met appellant in 1991 when she was living in the Philippines, and appellant was there visiting her friend Nannette prior to marrying her. (27 RT 5208.) Avendano visited Nannette and appellant in March 1999, and stayed at their apartment for three weeks, sleeping on a mattress on the living room floor. (27 RT 5209-5210.) Appellant seemed sad that Nannette was dating other men, and told Avendano that he didn't like it, but he did not seem to be angry, and he never said anything about wanting to hurt the men she was dating. (27 RT 5217-5218.)

Avendano was awakened one morning by a knock on the door. (27 RT 5211.) When Nannette opened the door, Avendano saw two police officers, and felt frightened. (27 RT 5211.) The officers both stood in the living room beside her mattress, then walked through the entire apartment,

including the living room, hallway, bedrooms, and kitchen. (27 RT 5212.) One touched a rolled cigarette that was in an ashtray in the kitchen. (27 RT 5212.) In the afternoon, she accompanied Nannette and Pantoni to pick up appellant from the Santa Ana jail. (27 RT 5213.) Appellant spoke about what had happened to him, and said that he had been pulled over because he didn't have his seat belt on, and then had been searched. (27 RT 5213.) He said that his testicles had been touched, and that he had been thrown to the street. (27 RT 5213.) As he spoke, he appeared sad, hurt, and humiliated. (27 RT 5314.) She never heard him say anything about hating the police, or wanting to hurt the police for what they had done to him, or wanting to kill the police. (27 RT 5214.)

Cherie Le Brecht testified that she and her son Eric shared the apartment with Nannette and appellant for three years until the shooting of Deputy Riches. (27 RT 5152-5153.) She and Eric had one bedroom in the two-bedroom apartment. (27 RT 5153.) She never had any concerns or fears about Eric being there alone with appellant, such as when Eric would come home from school while she was still at work. (27 RT 5154.) Appellant never threatened her or Eric in any way, and, indeed, was helpful to them both, and she knew that appellant would take care of Eric if any problems arose.[53] (27 RT 5154-5156.) She did, however, find appellant's religious beliefs strange when he would talk about Armageddon and the End of Times. (27 RT 5157.) During the time she lived in the apartment, she never saw any guns or bullets. (27 RT 5174.) The only one or two times she ever heard appellant mention guns was in reference to having heard mountain lions while on the mountain with Pantoni, and needing a gun there for protection. (27 RT 5174.) She saw appellant use marijuana

[53] Erik Le Brecht testified that he felt comfortable around appellant, and that he was never afraid of him. (34 RT 6478.)

in the apartment only twice. (27 RT 5178.) She often saw him drink beer during the three-year period, but never a lot of beer. (27 RT 5182-5183.)

Le Brecht testified that she thought of appellant as being a paranoid person. (27 RT 5164.) She had seen him act paranoid both with and without having drunk alcohol, but drinking would make the paranoia worse. (27 RT 5165.) The degree of his paranoia fluctuated during the three years that she lived there, but was always there in some degree. (27 RT 5165.) During an eight-month period prior to March 1999, she felt that his paranoia decreased somewhat. (27 RT 5165.) Although she still saw signs of it, he seemed calmer, was in a better mood, and wasn't drinking as much. (27 RT 5166.) However, after the initial incident with Deputy Spencer, his paranoia increased again, and he became depressed to the point of becoming obsessive, talked more about people watching him and about the end of the world, and appeared to be nervous around the police. (27 RT 5164, 5166.)

Le Brecht testified that appellant talked about being watched inside the apartment through the television, and about conspiracies involving the government keeping files on everyone, including himself. (27 RT 5167.) When he told her about the incident with Deputy Spencer, he said that he had been pulled over and frisked, and that the police had pulled down his pants, frisked his private areas, and really embarrassed him. (27 RT 5168.) He was humiliated by the experience, and it was visible in his face. (27 RT 5168-5169.) He also talked with her about being pulled over by the same officer a few weeks later. (27 RT 5169.) The fact that the same officer stopped him confirmed to him that the police were watching him. (27 RT 5169.) He wasn't angry, just embarrassed and humiliated and worried and frustrated. (27 RT 5170.) He didn't know what to do. (27 RT 5170.)

Appellant never appeared to be angry about Nannette's dating, only concerned about her safety and well-being. (27 RT 5162.) On the night that the shooting took place, Avendano had gone to bed at about 11:00 PM. (27 RT 5158.) At about 11:30, LeBrecht heard appellant's and Nannette's raised voices through her closed door. (27 RT 5158.) It didn't sound like they were angry with each other. (27 RT 5159.) Appellant sounded upset, and Nannette was trying to find out what was wrong. (27 RT 5158.) She heard Nannette call appellant "Sho," a term of endearment she used with him. (27 RT 5162.) As Le Brecht heard Nannette and appellant walk into their bedroom, she heard her say, "I love you, Sho." (27 RT 5162.)

In all the conversations she had with appellant, including the ones when he expressed frustration and upset toward the police and the government, she never heard him make a threat against anyone, or express a desire to get even with the police, or say that he wanted to kill police officers or harm them in any way, or even say that he hated the police. (27 RT 5175.) Appellant did not hate the police, but he didn't like them, and was wary of them. (27 RT 5176.)

2. Testimony of Deputy Andre Spencer.

Orange County Deputy Sheriff Andre Spencer testified that at about 7:30 AM on March 28, 1999, he pulled appellant over for not having his seatbelt fastened. (26 RT 4995, 4999, 5006.) Spencer wrote a narrative police report afterwards, and the traffic stop itself was recorded on videotape.[54] (26 RT 4999-5001.)

Appellant had been traveling southbound on Muirlands, approaching the intersection with Oswago, and Spencer had been traveling eastbound on

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[54] Spencer's patrol car was equipped with a Patrol Video System, which activated automatically whenever he turned on his overhead lights. (26 RT 5000.)

Oswago, approaching the same intersection. (26 RT 5078.) As Spencer stopped for the light, he saw appellant proceed south through the intersection, and noticed that he was not wearing his seat belt. (26 RT 5078.) He saw appellant look in his direction and then start to reach for his seat belt to put it on. (26 RT 5078-5079.) Spencer pulled in behind him. (26 RT 5080.)

Appellant got into the left-turn lane at the intersection with Muir Isles, and Spencer, believing that appellant was trying to avoid him, stayed behind appellant, and activated his overhead lights and video system. (26 RT 5080, 5085.) Thereupon, appellant began beating on his steering wheel, and Spencer could see that he was upset. (26 RT 5086.) Appellant pulled to a stop, removed his seat belt, and got out of his car. (26 RT 5087.) Spencer, still inside his patrol car, yelled at appellant two or three times, commanding him to get back inside his car. (26 RT 5092, 5094-5095.) When appellant did not immediately respond, Spencer yelled, "Get back in the fucking car," and appellant did so.[55] (26 RT 5092, 5095.)

Spencer testified that this was the first time that someone he had stopped had left his car. (26 RT 5025.) He stated that his training for traffic stops was to take control of the situation, to de-escalate it if necessary (such as if the person he stopped appeared to be nervous), and not to make the situation worse; and that an officer's anxiety or excitement or nervousness does not justify his using profanity. (26 RT 5025-5029.)

Spencer testified that he did not know why he ordered appellant to get back inside his car instead of having him sit on the curb, as he had been

[55] After viewing the video of the incident, Spencer acknowledged that, contrary to what he had written in his report, after getting out of his car, appellant never went as far as the rear of his vehicle, never shouted at Spencer asking why he had been stopped, and never moved to within arm's reach of Spencer's door. (26 RT 5037.)

trained to do in such a situation. (26 RT 5009.) He claimed that he was scared and nervous; that because he was still inside his own vehicle, hurrying to take off his seat belt and open his door, he felt that appellant had the jump on him, and, in the event of a confrontation, would have the upper hand. (26 RT 5088, 5099.) Spencer called for backup, requesting that they use lights and siren as they approach. (26 RT 5096.) As he got out of his car, he drew his weapon, went over to appellant's car, and ordered him to keep his hands on the steering wheel. (26 RT 5096-5098.)

As Spencer waited for backup to arrive, appellant told him that he had a lot on his mind, and was upset that he had forgotten his seatbelt, and remarked," I am going through a lot of problems with my wife." (26 RT 5038, 5100.) Spencer informed dispatch, "He seems to be settling down." (26 RT 5100.)

As the backup unit arrived, the video shows Spencer turning away and doing something with his hand. (26 RT 5103.) Spencer testified that he was only returning his pistol to his holster, and denied that he was turning off the microphone, attached to his belt, which was the only source of audio for the videotape of the incident. (26 RT 5103-5104.)

Spencer stated that it was during this brief interval, when no sound was recorded, that he asked appellant to step out of his vehicle, and obtained his consent to be searched. (26 RT 5104.) The audio did not resume until the search had begun. (26 RT 5041.) This is the only audio gap on the entire tape.[56] (26 RT 5041.)

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[56] Spencer claimed that he did not know why the microphone cut out at just that point, but speculated that there might have been a problem with the wiring, or that the siren from the approaching backup vehicle perhaps affected it in some unspecified way. (26 RT 5106.)

When the audio resumed, Spencer had appellant in a control hold with his left hand, was searching him with his right hand, and was asking appellant whether he was on either probation or parole.[57] (26 RT 5105.) Spencer found rolling papers in appellant's right jacket pocket, and then found about a teaspoon's quantity of marijuana in appellant's left jacket pocket. (26 RT 5035, 5112-5113.)

Appellant asked Spencer to just write him a ticket, and let him be on his way.[58] (26 RT 5049.)

Instead, Spencer continued searching appellant, unbuckled and pulled apart his belt, unbuttoned his pants, unzipped them so that his fly was completely down, and began looking inside his undershorts. (26 RT 5049-5050.)

Spencer had his left thumb inside the waist of appellant's underwear, and was attempting to pull the underwear away from his body so that he could see if there was anything between the underwear and appellant's skin. (26 RT 5118.) This took place at about 7:45 AM on a Sunday morning on a traffic island in the middle of a public street in Lake Forest. (26 RT 5049-5051.)

At this point, appellant said, "All right, cut the shit, man," broke free of Spencer's control hold, and attempted to pull up his pants.[59] (26 RT

[57] Spencer stated that he was aware that a person on probation or parole could be searched without having given consent. (26 RT 5043.)

[58] Spencer was aware that there are some infractions for which a violator can be cited instead of arrested, and for which he need only to show some form of identification and sign a note promising to appear in court; and that Health & Safety Code Section 11357(b) (possession of less than an ounce of marijuana) is one of these, and Vehicle Code Section 27315 (seatbelt infraction) is another. (26 RT 5048.)

[59] Spencer acknowledged that, contrary to what he had written in his report, appellant did not say, "That's fucking it," and did not attempt to turn around and face Spencer. (26 RT 5052.)

5052, 5116-5117.) Spencer said, "Put your fucking hands behind your back right now."

Spencer and the four other backup deputies present immediately threw appellant to the ground. (26 RT 5053, 5119.)

Spencer told appellant, "Now you are going to fucking jail." (26 RT 5053.)

When appellant said, "Come on, man, you are hurting me," a deputy replied, "We want to hurt you." (26 RT 5053, 5121.)

The video thereafter shows appellant standing with one leg pulled up behind him, and with one shoe and sock removed, continuing to be searched for contraband before his pants had yet been secured. (26 RT 5057-5058.)

Spencer arrested and handcuffed appellant, walked him back to his patrol car with his pants dropping to his knees, and locked him in the back seat.[60] (26 RT 5008, 5063.)

Spencer testified that his characterizing appellant to the other deputies as "a fucking asshole" after he was already handcuffed and in custody was unnecessary, and was inconsistent with de-escalating the situation. (26 RT 5067.)

Instead of taking appellant directly to be booked, Spencer drove to appellant's residence, which was about 300 yards away. (26 RT 5009, 5130.) Two other deputies, Northart and Prado, followed them there in their own separate cars. (26 RT 5009-5010.) When they arrived, Prado remained with appellant, and Spencer and Northart went upstairs to appellant's apartment. (26 RT 5010.)

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[60] Spencer arrested appellant for possession of less than an ounce of marijuana, and for obstructing, resisting, or delaying a police officer in the performance of his duties. (26 RT 5008.)

Spencer stated that he wanted to make a welfare check on appellant's wife. (26 RT 5015.) He testified that he remained in the doorway, and did not accompany Northart in entering the apartment.[61] (26 RT 5011.) He said that Northart told appellant's wife that her husband was under arrest, asked her if she was okay, and walked around the apartment by himself. (26 RT 5131.)

About a month later, Spencer pulled appellant over for a second traffic stop; he did not recall why he did so. (26 RT 5019, 5137.) He believed it might have been because appellant had failed to signal a turn, or because he had a broken taillight. (26 RT 5019, 5137.) He testified that he did not recognize appellant until he approached the car, but that during the stop, he made mention of the prior arrest. (26 RT 5019.) Appellant had a passenger in the car, and was non-confrontational, avoidant, and did not make eye contact with Spencer. (26 RT 5020.) Spencer did not give him a citation, and let him go with a warning about his taillight. (26 RT 5022.) Spencer made no police report and no patrol log entry, and, although he activated his overhead lights in making the traffic stop, there is no videotape of this incident. (26 RT 5022-5023.)

C. The Prosecution's Rebuttal Case.

Janet Perez testified that appellant was confined at the Huntington Beach Municipal Jail from June 18, 1999 through November 1, 1999, and that she was the manager of the facility from the time he arrived until September 11, 1999 when she was transferred to a different post. (35 RT 6574-6578.) During the three months that appellant was there under her overall supervision, she reviewed daily reports, and also talked with appellant a handful of times. (35 RT 6578.) She saw no reports of

[61] Spencer made no mention in his report of having gone to appellant's apartment, or of any deputy having entered it. (26 RT 5016.)

abnormal mental activities, saw nothing to indicate that appellant needed mental health treatment, and had no problems in communicating with him. (35 RT 6579-6581.)

Guy Clifton Dove, III testified that he succeeded Perez as jail manager in September 1999, and that during the six weeks of his tenure that appellant was confined there, he talked with him and witnessed his demeanor, and observed nothing to indicate that appellant had any type of mental health issue. (35 RT 6584-6586.) Dove acknowledged, however, that he did not know whether appellant had any latent mental health issue; that if a delusional disorder of a persecutory type had been present, he would not have known how to diagnose it; that he could not say what the elements of a paranoid delusional disorder were; and that he was not a trained psychologist or psychiatrist, had never read the DSM-IV and did not know what the term "DSM-IV" referred to, and could not distinguish between an Axis I and an Axis II diagnosis. (35 RT 6588-6589.)

Marvin Sather testified that he served as the senior detention officer during the entire time that appellant was confined at the Huntington Beach Municipal Jail, and, as such, was responsible for the medical and mental needs of all the inmates. (35 RT 6593.) He checked with appellant to see how he was doing every day that he was on duty, and saw nothing to indicate that appellant had a mental health issue. (35 RT 6594-6595.) Sather acknowledged that it was not his function to form some sort of clinical diagnosis as to whether appellant was, or was not, mentally ill, and that he would not have been qualified to do so. (35 RT 6600.)

Mark Daigle testified that on July 15, 1988, he was an Orange County Deputy Sheriff, assigned as a patrol deputy in the City of San Juan Capistrano. (35 RT 6064-6065.) At about 8:45 PM, he observed a small

pickup driving with its headlights off, and followed it in his patrol car. (35 RT 6605-6606.) After observing the pickup make two left turns without signaling, he turned on his overhead lights to pull the vehicle over. (35 RT 6608.) As Daigle followed, the vehicle drove erratically. (35 RT 6609.) After Daigle turned on his siren, he observed the driver throw several plastic baggies out the window. (35 RT 6609-6611.) When the vehicle finally stopped, Daigle saw the driver's door open. (35 RT 6612.) When he approached the vehicle with his gun drawn, he saw that the driver was still sitting in the driver's seat with his feet on the ground and his left hand inside the vehicle. (35 RT 6613, 6618.) When Daigle yelled, "Let me see your hands, put your hands up," the driver yelled back, "Shoot me, kill me." (35 RT 6613.) They yelled the same things at each other several times, and then, when two backup officers arrived about a minute later, Daigle and the other deputies wrestled the driver to the ground, and arrested him for evading, driving under the influence, and possession of marijuana. (35 RT 6613-6614.) The driver was appellant. (35 RT 6618.)

GUILT-PHASE ISSUES

I. BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT AT THE TIME OF THE HOMICIDE, MR. STESKAL ACTUALLY BUT UNREASONABLY BELIEVED HE HAD TO SHOOT DEPUTY RICHES TO DEFEND HIMSELF, THE TRIAL COURT ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON THE THEORY OF VOLUNTARY MANSLAUGHTER.

A. Introduction.

The defense introduced evidence which supported the theory that Mr. Steskal actually but unreasonably believed at the time of the homicide that he had to shoot Deputy Riches in order to defend himself. The defense factual theory was that Mr. Steskal held this actual but unreasonable belief because his interpretation of reality was affected by his severe mental illness. The reality of his encounters with Deputy Spencer exacerbated his severe mental illness, which in turn tragically affected his perception of Deputy Riches. Despite the introduction of this evidence the defense was denied instructions on voluntary manslaughter. (11 CT 2873-2874.)

The trial court's denial of an instruction on voluntary manslaughter was erroneous, and requires reversal as to both guilt and penalty.

B. The Legal Standard.

The legal standard is well-established:

> " 'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) "Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.' " (*People v. Cole, supra*, 33 Cal.4th at p. 1215.) This substantial evidence requirement

> is not satisfied by " 'any evidence ... no matter how weak,' " but rather by evidence from which a jury composed of reasonable persons could conclude "that the lesser offense, but not the greater, was committed." (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) "On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." (*People v. Cole, supra*, at p. 1215.)

People v. Avila (2009) 46 Cal. 4th 680, 704-705.

The due process clause of the United States Constitution protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368; see also *Carella v. California* (1989) 491 U.S. 263, 265, 109 S.Ct. 2419, 105 L.Ed.2d 218 ("The due process clause of the Fourteenth Amendment denies states the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense."). Consequently, a "defendant has a constitutional right to have the jury determine every material issue presented by the evidence." *People v. Modesto* (1963) 59 Cal.2d 722, 730 (disapproved in part on other grounds in *People v. Sedeno* (1974) 10 Cal.3d 703, 720).

Based upon these doctrines, a trial court must instruct the jury on every theory of the case supported by substantial evidence. *People v. Edwards* (1985) 39 Cal.3d 107, 116; *People v. Geiger* (1984) 35 Cal.3d 510, 519; *People v. Flannel* (1979) 25 Cal.3d 668, 684. This obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense are present. *People v. Valdez* (2004) 32 Cal.4th 73, 115; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351. Additionally,

if the defense requests an instruction on a particular defense or a lesser included offense, an instruction must be given so long as there is substantial evidence in support of the defense or lesser included crime. *People v. Wickersham* (1982) 32 Cal.3d 307, 324.

For instructions on a lesser included offense to be required, there must be "evidence that would justify a conviction of such a lesser offense." *People v. Hardy* (1992) 2 Cal.4th 86, 184. The instructions are required if the evidence is substantial enough to warrant consideration by the jury. *People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4. In making the determination whether to instruct on a lesser included offense the "trial court should not ... measure the substantiality of the evidence by undertaking to weigh the credibility of witnesses, a task exclusively relegated to the jury." *People v. Flannel, supra,* 25 Ca1.3d 668, 684. "[T]he fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon." *Ibid.* Any doubts about whether the evidence is sufficient to warrant the instructions are resolved in favor of the defendant. *Id.* at p. 685; *People v. Cleaves* (1991) 229 Cal.App.3d 367, 372. Even if the evidence in support of the instruction is "incredible," the reviewing court must proceed on the hypothesis that it is entirely true. *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1143.

In the present case the evidence warranted an instruction explaining the theory of unreasonable self-defense and its relationship to the element of malice necessary to support appellant's conviction for murder.

Murder is defined as the unlawful killing of a human being with malice aforethought. Penal Code section 187, subdivision (a). "Manslaughter is the unlawful killing of a human being without malice." Penal Code section 192. Thus, the distinguishing feature between murder

and manslaughter is the presence of "malice." *People v. Coad* (1986) 181 Cal.App.3d 1094, 1106. Generally, the intent to unlawfully kill constitutes malice. Penal Code section 188; *People v. Saille* (1991) 54 Cal.3d 1103, 1113; see *In re Christian S.* (1994) 7 Cal.4th 768, 778-780. However, "[a] defendant who intentionally and unlawfully kills lacks malice ... in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' [citation], or when the defendant kills in 'unreasonable self-defense' - the unreasonable but good faith belief in having to act in self-defense [citations]." *People v. Barton, supra,* 12 Cal.4th at p. 199.

When a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury, the doctrine of "imperfect self-defense" applies to reduce the killing from murder to voluntary manslaughter. *People v. Cruz* (2008) 44 Cal.4th 636, 664; *People v. Michaels* (2002) 28 Cal.4th 486, 529; *In re Christian S., supra,* 7 Cal.4th at pp. 771, 773. In such a situation, unreasonable or imperfect self-defense is not a true defense, but instead is a shorthand description of one form of voluntary manslaughter, a lesser included offense of murder. *People v. Barton, supra,* 12 Cal.4th at pp. 200-201.

C. Proceedings at Trial.

The question whether the trial court should instruct the jury on voluntary manslaughter, in addition to first and second degree murder theories, was litigated twice, first at trial and then in the context of a new trial motion. Specifically, the defense requested that the jury be instructed in the terms of CALJIC No. 5.17, which read in pertinent part:

"A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation and knowing the same facts would not have had the same belief."

(5 CT 1178; see 5 CT 1134-41 (request for instructions).)

The trial court refused to give CALJIC No. 5.17, and, based on that ruling, also refused to give CALJIC Nos. 8.40 (voluntary manslaughter)[62],

[62] CALJIC 8.40, based on Penal Code section 192, subdivision (a), provided:

[Defendant is accused [in Count[s]] of having committed the crime of voluntary manslaughter, a violation of section 192, subdivision (a) of Penal Code.]

Every person who unlawfully kills another human being [without malice aforethought but] either with an intent to kill, or with conscious disregard for human life, is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a).

[There is no malice aforethought if the killing occurred [upon a sudden quarrel or heat of passion] [or] [in the actual but unreasonable belief in the necessity to defend [oneself] [or] [another person] against imminent peril to life or great bodily injury].]

The phrase, "conscious disregard for life," as used in this instruction, means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life.

In order to prove this crime, each of the following elements must be proved:

1. A human being was killed;

2. The killing was unlawful; and

3. The perpetrator of the killing either intended to kill the alleged victim, or acted in conscious disregard for life; and

4. The perpetrator's conduct resulted in the unlawful killing.

[A killing is unlawful, if it was [neither] [not] [justifiable] [nor] [excusable].]

as well as 8.72[63] and 8.73.[64] (12 RT 2215-2216.) Thereafter, appellant raised the issue again in his new trial motion (37 RT 7093, 11 CT 2873), which the trial court denied. (37 RT 7112-7113, 11 CT 2945.)

D. There Was Substantial Evidence that Mr. Steskal Actually But Unreasonably Believed that He Had to Shoot Deputy Riches to Defend Himself.

The trial court erred in refusing to instruct on voluntary manslaughter because there was substantial evidence that warranted such an instruction. As will be shown, there was evidence that the defendant was suffering from a severe mental illness which manifested itself in, among other things, a psychotic delusion that the members of the Orange County Sheriff's Department were seeking to kill him. There was evidence that defendant armed himself on the night of the homicide, due to his psychotic delusion, to protect himself from law enforcement. There was no evidence that the shooting of Deputy Riches by defendant was provoked in any way. Under these circumstances, a jury was entitled to infer that defendant shot

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[63] CALJIC 8.72, entitled "Doubt Whether Murder or Manslaughter," provided:

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.

[64] CALJIC 8.73, entitled "Evidence of Provocation May Be Considered in Determining Degree of Murder," stated:

> If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.

the deputy under the actual but unreasonable belief that the deputy, by his mere presence at the same shopping center as defendant in the middle of the night, presented an imminent danger to him of death or great bodily injury.

Mr. Steskal suffered from a severe mental illness. Dr. Roderick Pettis was called for the defense. Pettis is a medical doctor specializing in psychiatry, and was employed as a clinical and forensic psychiatrist. (11 RT 2045.) He graduated from Boston University Medical School; completed an internship in psychiatry at UCSF; completed medical residency at Harvard Medical School; and also completed a one-year fellowship in forensics at Harvard Medical School. (11 RT 2046.)

Dr. Pettis was asked to evaluate Mr. Steskal for the presence of mental illness. In so doing, he reviewed 246 items, including police reports, academic reports, medical psychiatric records, investigative reports, and interviews with people acquainted with the defendant. (11 RT 2051.) Dr. Pettis interviewed defendant three times, for a total of about eight hours. (11 RT 2052.) Dr. Pettis reached the conclusion that, on DSM Axis I, defendant had a major mental illness, delusional disorder persecutory type, as well as dysthymic disorder (a chronic low level depression), and poly substance abuse; and that, on Axis II, defendant had a pre-existing schizotypal personality disorder. (11 RT 2053.)

Mr. Steskal's delusional disorder was a psychotic illness, connoting a break with reality. (11 RT 2055.)

Mr. Steskal's delusional disorder of the persecutory type was manifested by his fear of government, police, and, specifically, the Orange County Sheriffs Department. His delusions tended to focus on government spying and intrusion.

Dr. Pettis found particular significance in Mr. Steskal's March 1999 encounter with members of the Orange County Sheriff's Department.

In Dr. Pettis's opinion, the March 1999 encounter with Deputy Spencer and other members of the OCSD exacerbated Mr. Steskal's pre-existing paranoid symptoms into full-blown psychotic delusions. His fear of being followed, monitored, and observed, escalated into feeling that the police were going to kill him. (11 RT 2096.)

Mr. Steskal was pulled over on March 28, 1999, a short distance from his wife's apartment by Deputy Andre Spencer of the Orange County Sheriff's Department, because he was not wearing his seatbelt, according to Deputy Spencer. (7 RT 1310, 1312.) Much of the encounter was videotaped through the patrol video system inside Spencer's patrol car. The system can be manually started at the beginning of a shift; and if it has not been activated, it comes on automatically when the siren and overhead lights are activated. *Id.* The videotape was played for the jury and admitted into evidence. (Exhibit 39 (videotape); Exhibt 39-A (partial transcript of sound portion of video recording).) During the encounter, Deputy Spencer called for back-up, and was joined by four additional deputies.

The videotape clearly shows that Deputy Spencer and the other deputies treated Mr. Steskal in a highly unprofessional manner.

The videotape shows that when Deputy Spencer pulled over Mr. Steskal, appellant promptly complied. Mr. Steskal then got out of his car, standing by the open driver's-side door. Deputy Spencer ordered him: "Fuck, get back in the car. . . . . get back in the fucking car."[65] Mr. Steskal

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[65] The transcript of the audio portion of the videotape, Exhibit 39-A, p. 1, omits Deputy Spencer's first word, but "[f]uck" is audible on the tape itself.

did so. He then sat without incident for ten seconds, until Deputy Spencer then approached from the patrol vehicle – pointing his service weapon directly at Mr. Steskal as he approached. On the tape, Mr. Steskal can be heard explaining, at gunpoint, while seated in the car, that he got out of the car because he was upset, and that he had been having some problems with his wife. (See Ex. 39-A, p. 2.) Then, the sound of approaching sirens can be heard. *Id.* at p. 3.

At this point, the audio recording function of the video system went off and ceased to record for half a minute. (8 RT 1353-1357.)

It was Sheriff's Department policy that all traffic stops be audio-recorded as well as video-recorded. (8 RT 1349.) Deputy Spencer reached his right hand behind him during the stop. Spencer admitted that if the microphone had been attached to his belt, he would have been able to control it with this gesture, but he denied that it was attached. (8 RT 1353-1357.)

During that silent half-minute, according to Deputy Spencer, Mr. Steskal consented to a search. (8 RT 1353-1357.) The video shows Mr. Steskal getting out of his car, turning to face the car with his hands behind his back. Mr. Steskal can be heard talking with Deputy Spencer, reminding him the stop was for not wearing a seatbelt. Other deputies approach. Deputy Spencer finds some cigarette papers and asks Mr. Steskal where the marijuana is, and while holding Mr. Steskal restrained with his hands behind his back, attempts to search inside his underwear. When Mr. Steskal protests by saying, "cut the shit," and attempts to free his arms, the video shows he is instantly assaulted by a total of five deputies, who manhandle Mr. Steskal, throwing him forcefully to the ground, and piling onto him.

In addition to physically degrading Mr. Steskal, the deputies also verbally degraded him, taunting him by saying, "Now you're going to fuckin' jail." (Ex. 39A, p. 6.) When Mr. Steskal complained in pain, "come on, you're hurting me!" a deputy responded, "We want to hurt you." (*Id.*) A deputy derided Mr. Steskal as "another fine Lake Forest resident," and Deputy Spencer stated, "Fuckin' asshole, man." (*Id.* at pp. 9, 10.) After the deputies arrested Mr. Steskal they found a small amount of marijuana in his possession.

Following the arrest, Deputy Spencer and another deputy took Mr. Steskal back to his house under the pretext of doing a welfare check on Mr. Steskal's wife. (26 RT 5011, 5015.) The two deputes entered the residence and walked around from room to room. (8 RT 1532-1534.)

The traffic stop, the bodily search, the assault by five deputies, the arrest and the entry into Mr. Steskal's apartment had an enormous effect on his mental health and stability. Numerous witnesses confirmed this with testimony about his behavior after the incident. (8 RT 1426, 1429, (Ralph Pantoni); 8 RT 1505 (Cherie Le Brecht); 8 RT 1542-1543 (Joyce Avendano); 8 RT 1546-1552 (Dave Rodering); 8 RT 1557-1559 (Michelle Hauser).)

Thereafter, Mr. Steskal was again pulled over by Deputy Spencer in a second encounter, which only heightened Mr. Steskal's paranoia.

Mr. Steskal's behavior changed. He was falling apart. He told Dave Rodering that the Orange County sheriff's department was not only after him, but that they meant to kill him. (8 RT 1550.)

The night of the homicide, Kim Langlois saw Mr. Steskal acting irrationally. His statements clearly weren't directed at his wife. He armed himself to go buy cigarettes; he had the rifle to "protect myself from the

fucking law." (7 RT 1184.) He made no attempt to evade Deputy Riches, and he shot Deputy Riches without any reasonable provocation.

Dr. Pettis testified that Mr. Steskal was in a psychotic state on the night of the crime. (11 RT 2139-2140.)

This evidence was further substantiated by the testimony of Dr. Kris Mohandie, a clinical psychologist who has expertise in the neurophysiology of the human stress response, particularly in the context of officer-involved shootings. Dr. Mohandie had studied the effect that paranoia has on stress response. He testified that paranoia typically will prime the person to overreact, because he or she is in a chronic state of hypervigilance, almost a chronic state of fight or flight. Thus, they deplete many chemicals including serotonin and dopamine (or "noradrenaline") that are involved with the regulation of emotional reactions. (11 RT 2035.) An individual who is psychologically unstable within a sustained state of paranoia or hypervigilance would be in a very dangerous scenario in a fight or flight situation. (11 RT 2036.) The firing of a weapon a large number of times – as happened in this case -- may indicate the individual had a fight or flight response, and was in a reactive state. (11 RT 2038.)

The trial court mistakenly reasoned that CALJIC No. 5.17 was not warranted because there was no evidence that Deputy Riches posed a threat or that the threat was imminent. (12 RT 2207-2208.)

But CALJIC No. 5.17 does not require that there *be* an imminent threat of harm – it requires only that the defendant hold the actual but unreasonable *belief* that there is an imminent threat. If, for example, Deputy Riches had drawn his service revolver and pointed it at defendant, that might have led to a *reasonable* belief of imminent danger. But

defendant's belief – like his psychotic delusion in general – was unreasonable.

On this evidence, defendant was in the throes of a heightened psychotic episode centering on the desire of law enforcement to kill him, and was carrying a weapon "to protect [himself] from the fucking law" when he shot Deputy Riches. These facts, plus the fact that he shot without any provocation, could lead a reasonable jury to conclude that defendant shot Deputy Riches because he had, due to his psychosis, the actual belief that the deputy's mere presence posed an imminent danger to his life.

E. *People v. Elmore* Is Inapplicable To Unreasonable Self-Defense In This Case.

In *People v. Elmore* (2014) 59 Cal.4th 121, the Court addressed the question whether a jury instruction on unreasonable self-defense must be given when the unreasonable belief in the need for self-defense is based entirely on a delusion. The court held:

> unreasonable self-defense, as a form of mistake of fact, has no application when the defendant's actions are *entirely delusional*. A defendant who makes a factual mistake misperceives the objective circumstances. A delusional defendant holds a belief that is divorced from the circumstances. *The line between mere misperception and delusion is drawn at the absence of an objective correlate*. A person who sees a stick and thinks it is a snake is mistaken, but that misinterpretation is not delusional. One who sees a snake where there is nothing snakelike, however, is deluded. Unreasonable self-defense was never intended to encompass reactions to threats that exist only in the defendant's mind.

People v. Elmore, *supra*, 59 Cal.4th at pp. 136-137 (emphasis added).

Although Mr. Steskal's theory of defense was supported by expert testimony about his mental illness, this was not a case in which

unreasonable self-defense was based on a mistake that was "entirely delusional." Unlike the situation in *Elmore*, Mr. Steskal's misperception – while affected by mental illness -- was not "purely delusional," "divorced from the circumstances," and featuring "an absence of an objective correlate." Mr. Steskal did not think Deputy Riches was Satan, or Godzilla, or a snake. The evidence indicates Mr. Steskal perceived Deputy Riches as exactly what, in reality, he was – a deputy with the Orange County Sheriff's Department. There was an "objective correlate." *Elmore* is clearly distinguishable.

F. The Trial Court's Failure to Give the Requested Instructions on Voluntary Manslaughter Violated Appellant's Right to Due Process and to a Reliable Determination of Guilt Under the Fifth, Eighth and Fourteenth Amendments.

In *Beck v. Alabama* (1980) 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392, the United States Supreme Court held that a statute precluding the giving of instructions on lesser included offenses in capital cases was unconstitutional, and reversed the finding of guilt in that case on the grounds that the failure to instruct on a lesser offense made the verdict of guilt less reliable.

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense - but leaves some doubt with respect to an element that would justify conviction of a capital offense - the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Id. at p. 637. As the Ninth Circuit observed in *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, "in a capital case, due process requires the court to give a lesser included offense instruction if the evidence would support a conviction on that offense." *Id.* at p. 1081.

Appellant has previously demonstrated that the evidence would have supported a verdict of voluntary manslaughter based upon a theory of unreasonable self-defense. Consequently, the trial court was required to give the jury this option both by *Beck* and by *Breverman,* and the trial court's failure to instruct on this theory fatally undermined the reliability of the jury's verdict in the guilt phase.

G. Reversal Is Required.

Under *Beck,* the error amounted to a denial of due process and, thus, was of constitutional dimension requiring reversal unless the prosecution can establish the error was harmless beyond a reasonable doubt. *Chapman* v. *California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Additionally, because unreasonable self-defense operates to negate an element of the charged crimes, the failure to instruct on this concept was the equivalent of a misinstruction or failure to instruct on an element of the offense. In cases involving the failure to instruct on an element of an offense the *Chapman* standard of reversible error applies to the appellate court's determination to affirm or reverse.[66] *Neder v. United States* (1999)

[66] In *People v. Breverman, supra,* 19 Cal.4th at p. 149, this Court indicated that failure to instruct on a lesser included offense is tested for harmlessness under the California Constitution's miscarriage-of-justice standard, or the so-called *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) test of whether it is reasonably probable the defendant would have achieved a better result absent the error. This conclusion cannot be squared with *Neder* and the other federal authorities cited above. If improper presumptions, misinstructions on elements, and the like are errors subject to

527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35; *People v. Sakarias* (2000) 22 Cal.4th 596, 624-625; *People v. Flood* (1998) 18 Cal.4th 470, 492-507; *People* v. *Ramsey* (2000) 79 Cal.App.4th 621, 630-631; see *California v. Roy* (1996) 519 U.S. 2, 5, 117 S.Ct. 337, 136 L.Ed.2d 266. The judgment in such a case may be affirmed "only if it appears beyond a reasonable doubt that the error did not contribute to the particular verdict at issue." *People v. Sakarias, supra,* 22 Cal.4th at p. 625.

In this case, as seen above, there is substantial, *unrebutted* evidence that on the night of the homicide, Mr. Steskal was in the throes of a psychotic episode precipitated by the actions of members of the Orange County Sheriff's Department, and that his paranoia centered on the imagined intention of the Orange County Sheriff's Department and its members to kill him. This heightened state of fear and paranoia precipitated his reaction when he saw Deputy Riches. The jurors in the present case may have found that appellant's actions were not objectively reasonable – that he unreasonably believed Deputy Riches posed a danger to him, and acted on that belief. In the absence of instructions on unreasonable self-defense, the jurors had no way to give effect to that determination in the guilt-phase verdict. The fact that the jury found appellant acted with premeditation and deliberation does not negate the plausibility, on this evidence, that the jury found he acted after a split-second of premeditation, and while under the influence of an actual yet

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the *Chapman* test, logically so must be an instructional error which deprives the defendant of an evidence-based opportunity to negate an element - which is effectively a misinstruction on an element of the offense. Thus, the error requires reversal unless the prosecution can establish the error was harmless beyond a reasonable doubt.

unreasonable belief that he needed to act to protect himself from what he delusionally believed to be the imminent danger posed by Deputy Riches.

The prosecution's theory was that appellant was motivated by hatred, while the defense theory was that he was motivated by fear. Under the instructions given, the jury had no option to choose the defense theory. Consequently, the trial court's error in failing to properly instruct the jury on the theory of unreasonable self-defense cannot be regarded as harmless, and appellant's conviction must be reversed.

II. THE TRIAL COURT IMPROPERLY SUSTAINED PROSECUTION OBJECTIONS AND RESTRICTED THE TESTIMONY OF DEFENSE FORENSIC PSYCHIATRIST DR. RODERICK PETTIS, VIOLATING STATE LAW AND DENYING MR. STESKAL HIS RIGHT TO PRESENT A COMPLETE DEFENSE UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

A. Introduction.

As we have seen in connection with Argument I, a critical witness for the defense at Mr. Steskal's trial on guilt was Dr. Roderick Pettis, a forensic psychiatrist. Dr. Pettis interviewed defendant, and conducted an extensive review of materials related to Mr. Steskal's life and the circumstances leading up to and including the homicide, and came to the conclusion that Mr. Steskal suffered from an Axis I psychotic disorder, centering on the delusion that members of the Orange County Sheriff's Department intended to kill him. Dr. Pettis testified that Mr. Steskal was in a psychotic state on the night of the crime. (11 RT 2139-2140.) He suffered from a "break with reality." (11 RT 2055.)

The California law of evidence is clear that an expert witness may present not only his or her expert opinion, but also may testify to the factual basis on which that opinion is grounded. The federal constitution grants persons accused of crimes the right to present a complete defense. In this case, however, both California evidentiary law and the federal right to present a complete defense were violated when, via a series of rulings, the trial court improperly restricted the testimony of defense expert Dr. Roderick Pettis. As a consequence, the judgment must be reversed.

B. Legal Standards.

California Evidence Code section 801 provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is ... [¶] ... [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Evidence Code section 802 specifies:

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

In the context of this issue, federal constitutional guarantees also apply. "[T]he erroneous exclusion of important evidence will often rise to the level of a constitutional [due process] violation." *United States v. Stever* (9th Cir. 2010) 603 F.3d 747, 755. Moreover, the Supreme Court has stated:

> Our cases establish, at a minimum, that criminal defendants have . . . *the right to put before a jury evidence that might influence the determination of guilt.*

Taylor v. Illinois (1988) 484 U.S. 400, 408, 108 S.Ct. 646, 98 L.Ed.2d 798 (emphasis added). The defendant in a criminal case has

> the right to present a defense, the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies.

Washington v. Texas (1967) 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019. This right is rooted not only in due process, but also in the Sixth Amendment. *Crane v. Kentucky* (1986) 476 U.S. 683, 690-91, 106 S.Ct. 2142, 90 L.Ed.2d 636. And the Constitution "guarantees criminal defendants 'a meaningful opportunity to *present a complete defense.*'" *Id.* at p. 690 (emphasis added).

C. The Trial Court Improperly Restricted the Testimony of Dr. Pettis.

The trial court improperly restricted the testimony of Dr. Pettis in several ways. Notably, the trial court refused to allow Dr. Pettis to testify on direct examination as to facts giving rise to his opinion that on the morning of June 12, 1999 – the date of the homicide – Mr. Steskal was in a psychotic state. Among the facts at issue was that Dr. Pettis learned that Mr. Steskal had heard messages on the radio that influenced him to act in a psychotic manner.

> "Q. What you learned about Mr. Steskal that morning, and his behavior and conduct, was something that factored into your diagnosis of the mental illness, right?
> "A. That's correct.
> "Q. And you learned that Mr. Steskal was in fact suicidal that morning?
> "A. Yes, I did.
> "Q. And *you learned that Mr. Steskal had heard, was listening to the radio, and heard what he thought were messages that caused him to act in a psychotic manner*?
> "MR. BRENT: I am going to *object, lack of foundation* as to where he heard that.
> "THE COURT: *Sustained.*
> "Q. BY MS. SPEISER: Where did you hear that?
> "A. (No audible response).

"Q. *It is part of the information you received about the morning of June 12, 1999, information that you heard from Mr. Steskal?*

"A. That's correct.

"MR. BRENT: And I am going to *object to that as hearsay*, Your Honor.

"THE COURT: *Sustained.*"

(11 RT 2105-2106 (emphasis added).)

Assuming *arguendo* that the trial court properly sustained the prosecutor's objection based on lack of foundation, it is apparent that the court erred in sustaining the prosecutor's succeeding hearsay objection raised when, in order to provide that foundation, defense counsel sought to elicit whether the information about Mr. Steskal's hearing messages on the radio was information learned from Mr. Steskal.

Hearsay evidence, of course, "is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Evidence Code section 1200, subdivision (a).

Here, the evidence of a statement – that Mr. Steskal told Dr. Pettis he heard certain messages on the radio – was not offered to prove the truth of the matter stated – i.e., that Mr. Steskal in fact heard certain messages on the radio. Instead, it was offered to provide the factual basis for Dr. Pettis's professional opinion that Mr. Steskal was in a psychotic state on the date of the homicide. The fact of importance was that Mr. Steskal had told Dr. Pettis he heard messages on the radio, not that Mr. Steskal had actually heard such messages.

Evidence Code section 802, quoted in the preceding subsection, is quite plain. And this Court has stated:

> *An expert should be allowed to testify to all the facts upon which he bases his opinion, including relevant declarations to him.* (*People v. Brown* (1958) 49 Cal.2d 577, 585.) The statements are admissible

not as proof of the facts stated but to enable the expert to explain and the jury to appraise the basis of his opinion. (*Id.* at 586.)

People v. Ainsworth (1988) 45 Cal.3d 984, 1012 (emphasis added). Clearly, under Evidence Code section 802 and *People v. Ainsworth*, the trial court erred in sustaining the prosecutor's hearsay objection.

This error was not a singular one.

Defense counsel also attempted to elicit from Dr. Pettis whether anything Pettis learned about June 12, 1999 led him to believe that Mr. Steskal was merely angry about having to go to a class related to the traffic stop (as implicitly contrasted with a mental state more extreme than anger). The prosecutor's hearsay objection to this defense inquiry was sustained. 11 RT 2106.

Dr. Pettis further testified that Mr. Steskal's behavior at the apartment that night just prior to the homicide reflected his general instability and the exacerbation of his mental illness. He was in extreme despair, was extremely upset about needing to come down from the mountain, and his stress and anxiety levels were extremely high. (11 RT 2107.) Defense counsel asked Dr. Pettis whether Mr. Steskal's behavior at the apartment complex led Pettis to believe that Mr. Steskal was just angry. Again, a prosecution hearsay objection to this line of inquiry was sustained. (11 RT 2108.)[67]

The sustaining of the objections to these lines of inquiry was in each instance erroneous, and for the same reasons – under California law, an

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[67] The prosecutor also objected to this question on the basis that it assumed facts not in evidence – that appellant was at the apartment during the early morning hours. (11 RT 2017-2108.) This was also erroneous under *People v. Ainsworth, supra,* 45 Cal.3d 984, 1012, quoted above.

expert may properly testify to his or her opinions, and to the factual bases of those opinions, without transgressing the rule against hearsay. Evidence Code section 802; *People v. Ainsworth, supra,* 45 Cal.3d at p. 1012. Defense counsel, in examining Dr. Pettis, sought to do nothing more than authorized by section 802 and this Court in *Ainsworth.*

The trial court's erroneous sustaining of prosecution objections to Dr. Pettis's testimony resulted in not just state law error, but a denial of Mr. Steskal's federal constitutional rights. As we have seen, "criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois, supra,* 484 U.S. at p. 408. And the Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky, supra,* 476 U.S. at p. 690.

There was no question that Mr. Steskal fired the shots that killed Deputy Riches. The *only* material question for the jury to resolve was Mr. Steskal's mental state – was he in a condition to premeditate? (See 13 RT 2278, 2295 (defense closing argument conceding intent to kill).) Central to the defense was the testimony of Dr. Pettis, who had reviewed extensive case-related documents, and materials relating to Mr. Steskal's life and psychiatric condition, and had based his professional evaluations as well on eight hours of personal interviews with Mr. Steskal. (11 RT 2051-2052.)

But as a result of the trial court's improperly sustaining prosecution hearsay objections to Dr. Pettis's testimony, that testimony – which was nothing less than essential to the defense of this case – was irretrievably limited, compromised, and rendered ineffective. This violated Mr. Steskal's rights, under the Fifth, Sixth and Fourteenth Amendments, to present a complete defense to the charge against him.

D. The Guilt-Phase Judgment Must Be Reversed.

Mr. Steskal was denied the right to present a complete defense. This was federal constitutional error of the trial type, rather than structural error, and therefore the question is whether the prosecution can meet its burden to show, beyond a reasonable doubt, that the exclusion of the evidence could not have affected the verdict. In other words, the heightened standard of *Chapman v. California, supra,* 386 U.S. 18, 23-24 applies.

Under that controlling precedent, it is not the defendant's burden to show the error caused harm. On the contrary, it is the prosecution's heavy burden to demonstrate the *absence* of any harmful effect flowing from the error. The prosecution must

> prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.

Chapman v. California, supra, 386 U.S. at p. 24; see *Neder v. United States, supra,* 527 U.S. 1, 18 (erroneous admission of evidence in violation of the Fifth Amendment and erroneous exclusion of evidence in violation of the Sixth Amendment are both subject to harmless error analysis under *Chapman*).

As explained previously, the trial court refused to instruct the jury on voluntary manslaughter under the factually-supported theory of actual, unreasonable belief in the need for self-defense. Defense counsel conceded intent to kill (13 RT 2278, 2295) – leaving the question of premeditation and deliberation sufficient for first-degree murder as the only factually-disputed issue at the guilt phase trial.

The prosecution presented no evidence of its own regarding mental health issues. The prosecutor's position at trial – and his argument to the jury – was that Mr. Steskal killed out of anger. According to the prosecution, Mr. Steskal was angry at his wife, and angry at law

enforcement, and killed Deputy Riches, with premeditation, because "pure and simple . . . he hated cops." (12 RT 2244.)[68]

In contrast, the defense argued that Mr. Steskal was in an obsessive, delusional state on the date of the homicide, that his psychotic illness fixated on the delusion that the members of the Orange County Sheriff's Department were out to kill him, that in the grip of his delusion he carried a weapon to protect himself, and that he killed Deputy Riches in a panicked state without premeditation or deliberation. (13 RT 2314-2317, 2341-2342.) Under California law, """"An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse."""" *People v. Brady* (2010) 50 Cal.4th 547, 561.

Under these circumstances, the testimony of Dr. Pettis was essential. While other mental health professionals testified for the defense,[69] Dr. Pettis was the only expert to have reviewed all the materials, interviewed Mr. Steskal at length, and rendered a diagnosis. Dr. Pettis's diagnosis of Mr. Steskal – that he suffered from an Axis I psychotic disorder, a delusional

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[68] The prosecutor argued:

> "Why did the defendant kill Brad Riches? Because he was a cop. Pure and simple, because he was a cop. We don't call that a hate crime, but he hated cops and that's why he killed Brad Riches. He wanted to strike out at the very fabric of society, and he is able to do that by shooting a police officer."

(12 RT 2244.)

[69] Dr. Kris Mohandie, a clinical psychologist, testified generally to the "fight-or-flight" response. (11 RT 2012-2029.) Dr. Michael Asarnow, also a psychologist, testified to the results of neuropsychological testing he administered to Mr. Steskal. (10 RT 1771-1791.) Dr. David Smith testified regarding dual diagnosis. (10 RT 1885, 1895-1908.) And Dr. James Missett testified regarding his mental health evaluations of appellant's family members. (11 RT 1928, 1933-1938.)

disorder of the persecutory type – and his testimony that, on the date of the homicide, Mr. Steskal was suffering from a psychotic break with reality – were foundational to the factual theory of the defense of this case.

Here, the trial court's rulings incorrectly sustaining the prosecutor's hearsay objections to questions posed to Dr. Pettis prevented Dr. Pettis from explaining the factual basis for his opinion that on the date of the killing Mr. Steskal was in a psychotic state.

In particular, the jury was prevented from considering that Dr. Pettis's opinion was based on learning that Mr. Steskal heard messages on the radio that morning that caused him to act as he did. A reasonable jury, hearing this information and supporting details that would have been elicited had this line of inquiry not been cut off, would likely give much more credence and weight to Dr. Pettis's diagnosis that Mr. Steskal suffered a psychotic break with reality on the date of the homicide.

Moreover, as seen above, the prosecution's argument was that Mr. Steskal killed Deputy Riches because he was angry, and wanted to strike at the fabric of society. The trial court foreclosed defense counsel's inquiries of Dr. Pettis as to whether Mr. Steskal was just angry. A reasonable jury, hearing Dr. Pettis's answers might well have been persuaded that the prosecution's factual theory that Mr. Steskal was motivated by anger was, simply, incorrect.

The prosecution argued that Mr. Steskal, angry about his mistreatment by sheriff's deputies, "hating cops," and not acting out of mental illness, decided to kill a deputy sheriff essentially at random. But the actual nexus between his encounters with law enforcement and the homicide is that Mr. Steskal's mental illness made him so hypervigilant that when he saw Deputy Riches, he perceived a threat, panicked, and reacted

on impulse without premeditation or deliberation. Had the defense been able to substantiate this theory by showing that Dr. Pettis's opinion was that Mr. Steskal was not motivated by anger, but by a psychosis in which he received and acted upon messages from the radio, the result, quite possibly, would have been a more favorable verdict of second degree murder.

The same factors discussed above with respect to federal constitutional error also apply to demonstrate prejudice under the state law standard: it is reasonably probable that, absent the errors of California law, Mr. Steskal would have achieved a more favorable result. *People v. Watson, supra,* 46 Cal.2d 818, 836.

Accordingly, the judgment must be reversed.

III. BECAUSE OF THE PROSECUTOR'S MISCONDUCT DURING GUILT-PHASE CLOSING ARGUMENTS, THE JUDGMENT MUST BE REVERSED.

A. Introduction.

Prosecutors are not just lawyers.

> "Prosecutors . . . are held to an *elevated* standard of conduct. . . . A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. (*People v. Kelley* (1977) 75 Cal. App. 3d 672, 690.) As the United States Supreme Court has explained, the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' (*Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 1321, 55 S.Ct. 629].)"

People v. Hill (1998) 17 Cal.4th 800, 819-820 (emphasis added).

In this case, the prosecutor fell far short of meeting the "elevated standard" – instead, he committed misconduct in guilt phase closing arguments to the jury that violated California law and transgressed federal constitutional boundaries, requiring that the judgment be reversed.

B. The Prosecutor Committed Misconduct By Characterizing the Victim as "A Hero Cop."

1. Background.

In the American system of criminal justice, the focus of a trial of guilt is on the defendant, and specifically upon either his specific conduct (*actus reus)*, or his mental state (*mens rea*), or both. Unless there is a material dispute as to whether the victim's behavior provoked or excused the defendant's conduct, the victim's character – good, bad or indifferent -- is generally irrelevant. There was no such dispute in this case; Mr. Steskal

never contended that Deputy Riches' conduct in any way excused his own behavior or diminished his culpability.

Nevertheless, the prosecutor found a way to place Deputy Riches' character before the guilt phase jury. The shooting occurred after customer David Cavallo had left the store, and Deputy Riches had pulled up in his police vehicle outside the 7-Eleven store in which Mr. Steskal had just bought cigarettes from store clerk Vicki De Lara.

The prosecutor argued in closing argument to the jury that Riches must have seen Mr. Steskal holding a gun. (12 RT 2237.)

> "[PROSECUTOR:] Now, what on earth is going to cause Brad Riches to turn on his lights to warn this defendant that he is there? What on earth is going to cause Brad Riches to announce to the world, and particularly to [Mr. Steskal], 'Hey, buddy, I am here, come get me?' This is what's going to cause it."
> "MR. DAVIS: Well, I am going to object. This is improper argument.
> "MR. BRENT: ***That he is a hero cop***.
> "MR. DAVIS: I object. Improper argument and I ask to be heard side bar."

(12 RT 2238 (emphasis added).) The trial court convened a side bar, at which defense counsel stated that the prosecutor was

> "appealing to the passions of the jury and their emotions, and not to the facts of the case. In asking them to make a decision based on that, on that emotion rather than—
> "THE COURT: What emotion are we talking about?
> "MR. DAVIS: Appealing to sympathy for Brad Riches, and that he is a hero cop and that sort of thing.
> "THE COURT: I haven't heard that yet. What's on the board?
> "MR. BRENT: ***What I wrote on the board, 'hero cop***.'"

(12 RT 2239 (emphasis added).)

The trial court then found that the inference as to Riches' conduct was proper, and overruled the defense objection to the argument itself as lacking any factual basis. (12 RT 2239.)

As for the prosecutor's characterization of Deputy Riches as a "hero cop," the trial court stated it was "a little bit bothered," but overruled the defense objection, and instructed the prosecutor to explain he wasn't asking for sympathy, and, after he was done with it, to take down the board on which he had written "hero cop." (12 RT 2241, 2242.) Thereafter, in his argument to the jury, the prosecutor stated that "This is about whether the defendant committed this crime. We are not talking about sympathy for Brad Riches. That's not what this is about." (12 RT 2242.)

2. Discussion.

It is improper for the prosecutor to appeal to the passion and prejudice of the jury in closing argument during the guilt phase of trial. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250; *People v. Simington* (1993) 19 Cal.App.4th 1374, 1378. Moreover, "an appeal for sympathy for the victim is out of place during an objective determination of guilt. [Citations.]" *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057.

There can be no real doubt that, whatever the prosecutor later claimed, when in his closing argument to the jury he called the victim, Deputy Riches, a "hero cop," and wrote the words "hero cop" on a board in front of the jury, he appealed to the passions of the jury, and made an appeal for sympathy for the victim. This was improper.

> "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citation.]"

People v. Wilson (2005) 36 Cal.4th 309, 337. This Court adapted this test from the United States Supreme Court's test for evaluating jury instructions. *People v. Clair* (1992) 2 Cal.4th 629, 663.

In assessing whether there is a reasonable likelihood the jurors understood or applied the improper comments in an injurious manner, the Court looks to how a reasonable jury would have reacted, in the context of the trial as a whole. See *Penry v. Johnson* (2001) 532 U.S. 782, 800, 121 S.Ct. 1910, 150 L.Ed.2d 9 ("we will approach jury instructions in the same way a jury would -- with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'").

The death of any member of our society due to a homicide is a tragic event. But the death of a law enforcement officer signifies more, because of the special role that law enforcement officers play in our society, ensuring safety and security and, at times, risking their lives to do so. Accordingly, the mere fact that an officer, Deputy Riches, died in the line of duty in this case, without more, freighted it with meaning.

For the prosecutor to cast Deputy Riches as a "hero cop" was to make a blatant appeal for sympathy that has no place in a trial of guilt, and it is reasonably likely that the jurors understood this argument – reinforced by writing it on the board in front of jurors – to mean what the prosecutor obviously intended it to mean: that the jurors should consider Deputy Brad Riches' heroism in the line of duty in determining what degree of murder of which Maurice Steskal should be convicted.

C. The Prosecutor Improperly Invited the Jurors to Draw An Adverse Inference From Mr. Steskal's Failure to Call His Wife, Nannette Steskal, as a Witness.

In his guilt phase rebuttal argument, the prosecutor complained that Mr. Steskal had failed to fully explain "why that day, out of 14 years, all of

a sudden the defendant decided to act out." (13 RT 2367.) After briefly mentioning Deputy Spencer, the prosecutor continued:

> "Now, the person that was perhaps the best witness to talk about the defendant before the murder and after the murder, who I can't call because of the marital privilege, they don't call. They don't call Nannette Steskal."

(13 RT 2367.) Defense counsel promptly objected. (13 RT 2368.) The court held a sidebar conference, at which the prosecutor insisted that he could properly comment on the defense's "failure to call logical witnesses." (13 RT 2368.) The trial court sustained the defense objection only as to future comments by the prosecutor, thus implicitly overruling the defense objection to the improper reference the prosecutor had made, and expressly declined to grant the defense motion to strike. (13 RT 2371, 2372.)

This was erroneous, because the prosecutor's comment on Mr. Steskal's failure to call his wife Nannette Steskal as a witness was improper for at least two distinct reasons.

First, it is constitutionally impermissible for an inference to be drawn from the fact that a criminal defendant such as Mr. Steskal did not call a particular witness in his defense, or for the prosecution to ask the jury to make such an inference. This is because such an inference or argument impermissibly undermines the presumption of innocence, in violation of fundamental due process guarantees.

This Court has stated, on more than one occasion, that

> [P]rosecutorial comment upon a defendant's failure "to introduce material evidence or to call logical witnesses" is not improper.

People v. Wash (1993) 6 Cal.4th 215, 263. And, in *People v. Bradford* (1997) 15 Cal.4th 1229, 1340, the Court stated:

> Nor did the prosecutor's comments impermissibly shift the burden of proof to defendant. At the outset, and following advisement by the

trial court, Prosecutor Conn reiterated that the prosecution had the burden of proof by sufficient evidence to establish defendant's guilt, and that defendant had no duty or burden to produce any evidence. (See *People v. Ratliff* (1986) 41 Cal. 3d 675, 691.) A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.

However, the trend of the law has been to substantially narrow the circumstances under which a prosecutor can comment on a defendant's failure to call a particular witness. For example, the Florida Supreme Court has reasoned:

> . . . [T]he state should not have told the jury to draw inferences from the fact that Jackson did not call his mother to testify. It is well settled that due process requires the state to prove every element of a crime beyond a reasonable doubt, and that a defendant has no obligation to present witnesses. Accordingly, *the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence*. However, this Court has applied a narrow exception to allow comment when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state.

Jackson v. State (Fla. 1991) 575 So.2d 181, 188 (footnote omitted) (emphasis added).

In *State v. Brewer* (1985) 505 A.2d 774, 777, the Maine Supreme Court concluded:

> To allow *the missing-witness inference in a criminal case is particularly inappropriate since it distorts the allocation of the burden of proving the defendant's guilt*. The defendant is not obligated to present evidence on his own behalf. The inference may have the effect of requiring the defendant to produce evidence to rebut the inference. If he fails to do so, *the missing-witness inference allows the state to create "evidence" from the defendant's*

failure to produce evidence. Such a result is impermissible. *State v. Rule*, 355 N.W.2d 496 (Minn. App. 1984); *State v. Caron*, 300 Minn. 123, 218 N.W.2d 197, 200 (1974); *State v. Jefferson*, 116 R.I. 124, 353 A.2d 190, 199 (1976); *State v. Taylor* , R.I. , 425 A.2d 1231, 1234-36 (1981); *State v. Posey*, 269 S.C. 500, 238 S.E.2d 176 (1977).

(Emphasis added.) Thus,

> in a criminal case the failure of a party to call a witness does not permit the opposing party to argue, or the factfinder to draw, any inference as to whether the witness's testimony would be favorable or unfavorable to either party.

State v. Brewer, supra, 505 A.2d at p. 777.

More recently, in *State v. Hill* (N.J. 2009) 974 A.2d 403, 411-412, the New Jersey Supreme Court substantially restricted when a missing witness inference could be used against a defendant, explaining the constitutional basis for its conclusion:

> A defendant need not call any witnesses, choosing instead to rely on the presumption of innocence. *See Winship, supra*, 397 U.S. at 363, 90 S. Ct. at 1072, 25 L. Ed. 2d at 375 (stating that "[t]he [reasonable-doubt] standard provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law'" (quoting *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 403, 39 L. Ed. 481, 491 (1895))). "This presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Coffin, supra*, 156 U.S. at 459, 15 S. Ct. at 405, 39 L. Ed. at 493. Simply put, the presumption of innocence and the State's beyond-a-reasonable-doubt proof requirement work hand-in-hand to protect an accused and force the State to satisfy the proof requirements for a conviction. *See Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692, 48 L. Ed. 2d 126, 130 (1976) ("[A]lthough not articulated in the Constitution, [the presumption] is a basic component of a fair trial under our system of criminal justice.").

In *State v. Tahair* (Vt. 2001) 772 A.2d 1079, the Vermont Supreme Court, in the course of holding that a missing witness instruction was impermissible, set forth reasoning, both constitutionally- and prudentially-based, that is equally applicable to an adverse inference that a prosecutor makes in closing argument regarding a defendant's failure to call a particular witness. The court noted that "[c]ourts and commentators have identified several reasons for restricting or even rejecting the rule," (*id.* at p. 1084), and then discussed no less than four of those reasons:

> First, to the extent that the rule derived from the venerable common law practice of "vouching," which prohibited parties from impeaching their own witnesses, its rationale has been undermined by the abandonment of the voucher rule in this and most other states. . . . As the court explained in *Brewer*, "since neither party vouches for any witness's credibility, the failure of a party to call a witness cannot be treated as an evidentiary fact that permits any inference as to the content of the testimony of that witness." 505 A.2d at 776-77 . . . .
>
> Many have also noted that the availability of modern discovery procedures has undermined "whatever utility the inference might once have possessed in compelling a reluctant party to identify witnesses who might be expected to testify to relevant evidence." *Brewer*, 505 A.2d at 777. . . .
>
> . . . [T]he missing witness rule has also been sharply criticized for its "potential inaccuracy and unfairness." R. Stier, *Revisiting the Missing Witness Inference-Quieting the Loud Voice from the Empty Chair*, 44 Md. L. Rev. 137, 151 (1985). As noted, the basis of rule is that, where a party fails to call an available witness whose testimony would be expected to be favorable, a "natural" inference arises that the witness would have given testimony unfavorable to that party. See *Burgess*, 440 F.2d at 237.
>
> Critics have noted, however, that "the decision not to call the witness may be based upon many facts besides the party's fear that weaknesses in the case will be exposed if testimony is heard." Stier, supra, at 145; see also *Malave*, 737 A.2d at 449 ("there are many reasons why a party may choose to refrain from calling a witness

> that have little or nothing to do with the substance of the witness' testimony"); *Edwards, supra*, at 706 ("Simply as a matter of legitimate trial tactics, criminal defendants may choose not to call witnesses for many reasons unrelated to guilt or innocence.").
>
> . . . .
>
> Finally, many courts and commentators have noted that the instruction raises constitutional concerns by implying that the defendant has some obligation to produce evidence, thus diminishing the State's burden of proving the defendant's guilt beyond a reasonable doubt. *See Brewer*, 505 A.2d at 777 ("The inference may have the effect of requiring the defendant to produce evidence to rebut the inference."); *Caron*, 218 N.W.2d at 200 (such comment "might suggest to the jury that defendant has some duty to produce witnesses or that he bears some burden of proof"); *Jefferson*, 353 A.2d 190 at 199 (same) . . . .

State v. Tahair, supra, 772 A.2d at pp. 1084-1085.

The rationales for disapproving the missing witness instruction apply equally to prosecution arguments, such as made in this case, that invite the jury to draw a negative inference from a defendant's failure to call a particular witness at trial.

Accordingly, this Court should hold that a prosecutor's comment that invites the jury to draw an adverse inference from the defendant's failure to call a particular witness violates a defendant's federal constitutional right to due process of law because it is inconsistent with, and impermissibly undermines, the presumption of innocence, and because the inference is not a natural or logical one, but is inaccurate and unfair given the wide variety of reasons a party may not call a witness.

The Court should further hold that an adverse inference violates California law, in light of the policy reasons summarized in *State v. Tahair, supra*. The Court should disapprove its prior decisions, such as *People v. Wash, supra,* 6 Cal.4th 215, 263 and *People v. Bradford, supra,* 15 Cal.4th 1229, 1340, to the extent they suggest otherwise.

Even apart from the impropriety for the prosecutor's drawing an adverse inference from the failure of the defense to call a particular witness, there is a second independent reason why the prosecutor's comment on Mr. Steskal's failure to call his wife, Nannette Steskal, as a witness was improper. Under Evidence Code section 980, Nannette Steskal had a privilege that neither party could overcome.

As the prosecutor's argument to the jury reflects, the defendant was married to Nannette Steskal. (13 RT 2367.) The prosecutor was also correct that he couldn't call Nannette Steskal as a witness. Under Evidence Code section 970, "Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding." Evidence Code section 971 reinforces this.[70] Sections 970 and 971 did not, themselves, prevent Mr. Steskal from calling his wife as a witness. And this court has made clear that the spousal testimonial privilege does not preclude a prosecutor's comment in like circumstances.[71]

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[70] Evidence Code section 971 provides:

> "Except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section unless the party calling the spouse does so in good faith without knowledge of the marital relationship."

[71] In *People v. Coleman* (1969) 71 Cal. 2d 1159, 1167, the Court stated:

> Comment on a wife's failure to testify for her defendant husband does not, therefore, constitute comment on the exercise of a privilege that defendant has (see Evid. Code, § 913) or on his failure to call a witness that he cannot compel to testify on his behalf. Since defendant's failure to call his wife was a failure to call a material and important witness, his not doing so could be considered by the jury and commented upon by the prosecuting attorney.

But under Evidence Code section 980, Nannette Steskal had a privilege that neither party could overcome. That section provides:

> Subject to Section 912 [relating to waiver] and except as otherwise provided in this article, *a spouse* (or his guardian or conservator when he has a guardian or conservator), *whether or not a party, has a privilege* during the marital relationship and afterwards *to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse* while they were husband and wife. (Emphasis added.)

Thus, as to communications between Mr. Steskal and his wife before and after the homicide, Nannette Steskal *herself* had a privilege not to testify under Evidence Code section 980.[72]

The prosecutor criticized Mr. Steskal, and asked the jury to draw a negative inference, from his failure to call a witness to testify when her testimony would include communications as to which, under Evidence Code section 980, he could not compel her testimony. This is grossly unfair, violates the federal constitutional guarantee of due process, and comprises prosecutorial misconduct as well.

The likely effect of this misconduct was, undoubtedly, exactly what the prosecutor intended -- to convey to the jury that it could consider, and draw an inference adverse to Mr. Steskal, from Mr. Steskal's failure to call his wife as a witness. Therefore, there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.]" *People v. Wilson, supra,* 36 Cal.4th at p. 337.

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[72] The privilege does not protect communications made to enable anyone to commit a crime (Evidence Code section 981), but the prosecutor's comment did not concern planning or aiding a crime; instead, it was directed at appellant's failure to call his wife as a witness to explain his mental state. (13 RT 2367.)

D. Federal Due Process Violation.

Even apart from the specific violation of federal due process guarantees discussed above in connection with the prosecutor's comment on Mr. Steskal's failure to call his wife as a witness, the prosecutor's closing arguments additionally violated due process standards.

The prosecutor's closing argument to the jury is "an especially critical period" of the trial (*People v. Perez* (1962) 58 Cal.2d 229, 245), so that misconduct during such argument may deprive a defendant of a fundamentally fair trial and thereby comprise constitutional error. *Darden v. Wainwright* (1986) 477 U.S. 168, 106 S.Ct. 2464 , 91 L.Ed.2d 144; *Greer v. Miller* (1987) 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618. As noted above, prosecutorial misconduct rises to the level of a due process violation when the misconduct is so egregious it renders the trial fundamentally unfair. *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431; *Darden v. Wainwright, supra,* 477 U.S. 168, 181.

In this case, the prosecutor committed several acts of misconduct in closing arguments. As noted above, he labeled the victim as a "hero cop," both orally and by writing those words on a board facing the jurors. This was inflammatory misconduct.

This misconduct was part of a pattern. Shortly after communicating to the jury that Deputy Riches was a "hero cop," in a similar appeal to passions and prejudice, the prosecutor assailed Mr. Steskal by claiming he "dr[ove] off like a coward." (12 RT 2247.) Defense counsel promptly objected, and this time the trial court sustained the objection, and admonished the jurors not to consider the word "coward." (12 RT 2247.)

The court refused, however, to instruct the jury that the prosecutor had committed misconduct. (12 RT 2249.)

And finally, in rebuttal argument, the prosecutor improperly commented on Mr. Steskal's failure to call his wife as a witness. (13 RT 2367.)

This was a pattern of misconduct. The trial court failed to effectively correct the prosecutor's misconduct, implicitly placing its seal of approval on the appropriateness of the prosecutor's characterization of the victim as a "hero cop," and on the prosecutor's invitation to the jury to draw an adverse inference from the fact that Mr. Steskal had not called his wife as a witness. As a consequence, Mr. Steskal was deprived of a fundamentally fair trial.

E. The Judgment Should Be Reversed.

Under California law, a defendant's conviction will not be reversed for prosecutorial misconduct unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. *People v. Barnett* (1998) 17 Cal.4th 1044, 1133. The test applicable to federal constitutional error of the trial type is, of course, that of *Chapman v. California, supra*, 386 U.S. at p. 24, under which it is respondent's burden to "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." Under either standard, the same result obtains.

This was not a case in which a verdict of first-degree murder was a foregone conclusion. Although it was undisputed that Mr. Steskal shot and killed Deputy Riches, it was also undisputed that he suffered from a serious mental disorder and was on the night of the killing actively psychotic.

Under these circumstances, the jury could have plausibly concluded that, while Mr. Steskal intended to kill, as the defense conceded, his mental state was so disordered and irrational that it could not be said beyond a reasonable doubt that he premeditated and deliberated.

But the prosecutor's misconduct effectively diverted the jury's attention from the key issues regarding Mr. Steskal's mental state, to the character of Deputy Riches, the "hero cop." That this is inflammatory is undeniable. In his final rebuttal argument, delivered just before the case went to the jury, and with no opportunity for the defense to respond, the prosecutor improperly made an issue of Mr. Steskal's failure to call his wife as a witness – surely a charge any jury would consider damaging. Under any standard it cannot be said that these errors were harmless.

IV. THE TRIAL COURT ABUSED ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 AND VIOLATED MR. STESKAL'S RIGHT TO DUE PROCESS OF LAW BY ALLOWING, OVER DEFENSE OBJECTION, A JURY VIEW OF DEPUTY RICHES' BULLET-RIDDLED PATROL CAR.

A. Introduction.

Deputy Riches was killed while seated in his patrol car, which sustained extremely intensive damage to the driver's area when it was struck by thirty rifle rounds fired at close range. The trial court characterized the vehicle itself as a "horrible piece of evidence." (3 RT 492.)

Nevertheless, despite the virtual certainty of prejudice from a jury view of this "horrible" evidence, and despite the absence of any probative value that might outweigh this horror, the trial court, over defense objection, permitted the jury to view the vehicle, in the basement of the courthouse where it had been taken for that purpose. The trial court abused its discretion in so doing, and the evidence was so inflammatory as to deny Mr. Steskal his federal constitutional right to due process of law.

B. Proceedings in the Trial Court.

Before trial, the prosecution filed a one-paragraph motion to permit a jury view of Deputy Riches' patrol vehicle, which would, the prosecution proposed, be brought to the courthouse for that viewing. (5 CT 1078.) The motion cited no legal authority, and set forth no reasoning in favor of granting the motion.

The defense opposed the motion and objected to a jury view of the patrol car under Evidence Code section 352. (3 RT 487-488.) The trial court overruled the objection. (3 RT 494.)

The defense made a motion for reconsideration. The trial court viewed Riches' police car at the crime lab, but denied the motion for reconsideration. (7 RT 1141-1142.)

Defense counsel again renewed the objection, in light of the photographs of the patrol car the prosecution sought to have admitted. (7 RT 1288-1291.) Again, the trial court overruled the defense objection. (7 RT 1291.) Thereafter, the jury viewed the vehicle in the basement of the courthouse. (7 RT 1294-1296.)

C. Legal Standards.

Penal Code section 1119 authorizes jury views, and applies to views of personal property as well as views of locations. It provides:

> When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or <u>any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom</u>, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal, as the case may be, to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

(Emphasis added).

A jury's view is considered to be independent evidence. See *People v. Garcia* (2005) 36 Cal.4th 777 (jury view is receipt of evidence); see also *People v. Bush* (1886) 68 Cal. 623; *People v. Milner* (1898) 122 Cal.

171, 184-85 ("If...the court should direct that the place where the material fact occurred should be viewed by the jury, and the jury should be conducted to the spot, and the panel of the door pointed out to them, would it be any the less the reception of evidence because obtained in this way? Certainly not"); *People v. Bolin* (1998) 18 Cal.4th 297, 325 (court has long held that "in so viewing the premises the jury was receiving evidence" even if nontestimonial).

"A court's ruling on a party's motion for a jury view is reviewed for abuse of discretion," that is, "whether the court exercised its discretion in an arbitrary, capricious, or patently absurd manner." *People v. Friend* (2009) 47 Cal.4th 1, 47.

Under Evidence Code section 352, the court must determine whether the "probative value" of the evidence sought to be admitted is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." On review of a ruling under Evidence Code section 352, the abuse of discretion standard applies. *People v. Hamilton* (2009) 45 Cal.4th 863, 929.

D. Discussion.

The trial court abused its discretion under Evidence Code section 352 in overruling the defense objection and permitting a jury view of the vehicle.

1. **The jury view of the bullet-riddled patrol car had no substantial probative value.**

A jury view is appropriate when it will assist the jurors to resolve some disputed factual issue. But when there is an adequate alternative, jury views are frequently denied.[73]

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[73] See, for example:

-- *People v. Lawley* (2002) 27 Cal.4th 102, 157-159 (The trial court did not err in denying pro se defendant's motion to have the jury view defendant's cabin after a prosecution witness testified that he had observed defendant and two others talking in the bathroom of the cabin, and saw actions suggesting defendant had given a gun to one of the other people in the bathroom. Defendant contended it was necessary for the jury to see the cabin to evaluate defendant's assertion that three people could not fit in the bathroom. The jury had photographs and a diagram of the cabin to examine, and defendant could have sent an investigator to the scene to take any measurements he believed necessary.)

-- *People v. Fudge* (1994) 7 Cal.4th 1075, 1104-1105 (The trial court did not abuse its discretion in denying defendant's motion to have the jury view the jail area where defendant allegedly threatened a prosecution witness; the trial court had noted that use of diagrams was an alternative and defendant presented no evidence establishing that diagrams would be inadequate.)

-- *People v. Price, supra,* 1 Cal.4th at pp. 421-422 (The trial court did not abuse its discretion in denying defendant's request for a midnight viewing of crime scene (sought so the jury could assess the accuracy or truth of the testimony of a witness who claimed to have seen defendant entering the victim's apartment around that time) because the court could properly have considered the substantial inconvenience inherent in such a viewing and the witness' testimony could have been tested by other means.)

-- *People v. Kraft* (2000) 23 Cal.4th 978, 1052-1053 (In a prosecution for multiple counts of first degree murder, the trial court did not abuse its discretion in denying a defense motion for a jury view of the scene where one victim's body was found, where the photographs admitted into evidence and the testimony of several witnesses made clear the remote and rugged nature of the terrain at issue. The jury could thus draw its own inferences about the probability defendant was capable of committing the

The jury view of the patrol car had no "substantial probative value" on any "disputed material issue" in this case. See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.

The defense argued that whatever probative value a jury view might have in the abstract, in the context of this case, with the admission of videotapes, photographs and witness testimony, a jury view of the patrol vehicle was cumulative. (3 RT 490.)

The trial court disagreed, stating that viewing the vehicle "assists the trier of fact as far as the position of the defendant and the position of the victim. So for that reason the objection is overruled." (7 RT 1142.)

On a further objection, the trial court elaborated that the jury view would not be cumulative, stating that it would be

> "very beneficial to the trier of fact, because it gives you the perspective of the shooter and the victim that you don't get looking at the photographs, and that's based on the court's viewing." (7 RT 1291.)

There was no material dispute regarding the events of the killing. It was undisputed at trial that Mr. Steskal shot and killed Deputy Riches, without provocation, shooting thirty rounds from an AK-47 knockoff rifle at close range into the patrol vehicle.

There were surveillance videotapes from the 7-Eleven showing the shooting. (Exhibits 2-4, 7 RT 1186-1187, 1195-1196.)

There were descriptions of the scene by a civilian Robert Bombalier (7 RT 1208-1218), by two deputies who arrived on the scene, Deputy Torres and Deputy Acuna (7 RT 1222-1225, 1229-1237), and by a

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crime and the differences between this offense and the others with which defendant was charged.)

criminalist who examined the scene, Elizabeth Thompson (7 RT 1266-1277).

There were photographs of the automobile itself. (8 RT 1384.)

There was no dispute regarding the position of either Deputy Riches, who remained seated in his patrol vehicle (7 RT 1216), or Mr. Steskal, whose position was described by eyewitness Vickie De Lara (7 RT 1185) and confirmed by surveillance videotape.

The trial court's observation that seeing the patrol car itself, and not merely photographs, "gives you the perspective of the shooter and the victim that you don't get looking at the photographs" is insufficient to demonstrate any probative value.

There was no contested issue regarding the perspective of the victim, which was irrelevant to the only contested issue at the guilt-phase trial, premeditation and deliberation. Similarly, there was no contested issue regarding Mr. Steskal's visual perception of Deputy Riches.

Moreover, even if there had been such an issue, the trial court would nevertheless still be incorrect in concluding that viewing the patrol vehicle itself "gives you the perspective of the shooter and the victim."

To obtain even a rough equivalent of "the perspective of the shooter" (or that of the victim), it would have been necessary to transport the patrol vehicle, not to the basement of the courthouse, where it was actually taken (36 RT 6837) – but to the scene of the shooting itself, the Lake Forest 7-Eleven store. Only then could jurors have stood where the shooter stood, and seen what he saw from his perspective.

Even if the proffered evidence is, considered by itself, somewhat probative, if in the context of the total evidence it is cumulative, there is

nothing for the trial court to balance on the "probativity" side of the Evidence Code section 352 equation.

Thus, in *People v. Ewoldt* (1994) 7 Cal.4th 380, 405-406, this Court considered whether evidence of a defendant's similar uncharged acts would generally be admissible under section 352:

> In many cases the prejudicial effect of such evidence would outweigh its probative value, because *the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute*. (*People v. Schader*, *supra*, 71 Cal.2d 761, 775.) (Emphasis added.)

The prosecutor argued to the trial court that the jury view should be permitted because it demonstrated the res gestae of the crime, and he was entitled to prove his case. 3 RT 490. It is true that "defendant's not guilty plea put in issue all of the elements of the charged offenses, including the elements he conceded." *People v. Cowan* (2010) 50 Cal.4th 401, 476; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 69, 112 S.Ct. 475, 116 L.Ed.2d 385 (the "prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element"). Thus, the prosecution was "still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent." *People v. Cowan, supra*, 50 Cal.4th at p. 476, citing *People v. Steele* (2002) 27 Cal.4th 1230, 1243.

But that does not mean that the prosecution is entitled to introduce every piece of evidence that might somehow demonstrate its case, no matter how (a) irrelevant to any actual contested issues, (b) cumulative to testimony of witnesses and photographs, and (c) prejudicial that piece of evidence might be. That the prosecution is entitled to prove every element of its case does not indicate that Evidence Code section 352 is abrogated, or

that the due process guarantees of the state and federal constitutions place no limits on that proof.

Here, because the jury view had no substantial probative value on any disputed factual issue, and was merely cumulative to other evidence, the trial court should have excluded it under section 352, even if it had raised only *some* substantial danger of undue prejudice.

2. In the absence of any substantial probative value, and in view of the highly prejudicial nature of a jury view of the bullet-riddled vehicle, the trial court abused its discretion in authorizing a jury view of the patrol vehicle.

As this Court has explained:

> The "prejudice" referred to in Evidence Code section 352 applies to *evidence which uniquely tends to evoke an emotional bias against the defendant as an individual* and which has very little effect on the issues.

People v. Karis (1988) 46 Cal.3d 612, 638 (emphasis added).

There can be no question that the jury view of the patrol car in this case is extremely prejudicial evidence within the meaning of section 352.

Indeed, a serious limitation in presenting and considering this issue must be acknowledged.

Words, and photographs, are simply inadequate to convey the emotional impact of the presence, in real-time, in metal, glass and fabric, of Deputy Riches' patrol vehicle. In the driver's seat area, metal is shredded and ripped with bullet-holes; glass is shattered and lies in tiny pieces; and fabric is torn and blood-soaked.

This is a death scene.

It is not in 3-D.

It is not "realistic."

It is real.

It is, as the trial court noted, a "horrible piece of evidence." (3 RT 492.)

Under Evidence Code section 352, "*courts must focus on the actual degree of risk* that the admission of relevant evidence may result in undue delay, prejudice, or confusion." *People v. Hall* (1986) 41 Cal.3d 826, 834 (emphasis added).

Here, the actual degree of risk of unfair prejudice was high. The probative value of the jury view was nonexistent. The trial court abused its discretion in allowing the jury view.

3. The jury view violated Mr. Steskal's federal due process rights.

Moreover, the jury view violated Mr. Steskal's federal constitutional right to due process of law. Federal courts find due process violated when the prosecution introduces evidence that has no legitimate probative value from which inferences can be drawn, and the evidence is of an "inflammatory quality" so as to prejudice the right to a fair trial. E.g., *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385, 1386.

In this case, the same factors that establish that the trial court necessarily abused its discretion under section 352 also demonstrate that the trial court's ruling violated federal due process principles. The jury view, as discussed above, had no substantial, non-cumulative probative value. And the evidence was of an inherently inflammatory nature.

E. The Jury View Was Prejudicial.

Whether using the *Chapman* standard for federal constitutional error, or the lesser standard of *People v. Watson* for state-law error, the Court should conclude that the erroneous allowance of a jury view of the patrol vehicle prejudiced Mr. Steskal. Under the federal standard respondent cannot show, as it is required to do beyond a reasonable doubt, that the error did not contribute to the first-degree murder verdict. And under the state standard, it is at least reasonably probable that Mr. Steskal would have received a more favorable guilt-phase result if the jury had not been contaminated by this "horrible piece of evidence" (3 RT 492) – the death scene which is Deputy Riches' patrol car – in reaching its verdict.

As noted above, a first-degree murder verdict was not the only plausible verdict for the jury in this matter. Although the defense at trial admitted that Mr. Steskal intentionally shot and killed Deputy Riches, the circumstances of the offense – especially in light of Mr. Steskal's severe mental illness, focusing on the delusion that members of the Orange County Sheriff's Department were out to kill him – were such that a jury could reasonably have found that the prosecution had not met its burden to prove beyond a reasonable doubt that Mr. Steskal had the mental state required for premeditation and deliberation.

But the jury view of this "horrible piece of evidence" -- this portable, preserved death scene that is Deputy Riches' patrol vehicle – effectively shifted the focus from Mr. Steskal's mental state to evidence that could only provoke an overwhelming emotional reaction.

The judgment should be reversed.

V. THE JUDGMENT OF CONVICTION SHOULD BE REVERSED DUE TO CUMULATIVE ERROR.

Each of the grounds set forth above prevented Mr. Steskal from receiving a fair murder trial as guaranteed by state law and by the Sixth and Fourteenth Amendments, and each one warrants reversal of the judgment. But even if the Court should conclude that any one of the federal or state law violations shown above is insufficient to require a new trial, the Court should consider the effect of the errors taken together, and reverse due to cumulative error.

As this Court stated in *People v. Hill, supra*, 17 Cal.4th at pp. 844-845:

> ***"a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.*** (*People v. Purvis, supra,* 60 Cal.2d at pp. 348, 353 [combination of 'relatively unimportant misstatement[s] of fact or law,' when considered on the 'total record' and in 'connection with the other errors,' required reversal]; *People v. Herring, supra,* 20 Cal.App.4th at pp. 1075-1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal]; see *In re Jones* (1996) 13 Cal.4th 552, 583, 587 [cumulative prejudice from defense counsel's errors requires reversal on habeas corpus]; *People v. Ledesma* (1987) 43 Cal.3d 171, 214-227 [same]; see also *Samayoa, supra*, 15 Cal.4th at p. 844 [prosecutorial misconduct does not require reversal "whether considered singly or together"]; *People v. Bell* (1989) 49 Cal.3d 502, 534 [considering 'the cumulative impact of the several instances of prosecutorial misconduct' before finding such impact harmless]; cf. *People v. Espinoza, supra*, 3 Cal.4th at p. 820 [noting the prosecutorial misconduct in that case was 'occasional rather than systematic and pervasive'].)" (Emphasis added.)

Accord, e.g., *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179 ("'Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'").

In this case, as shown above, any of the errors independently provide grounds for reversal. Taken together, the cumulative impact of any two or more of the errors produced an unfair trial under California law, and prejudicially deprived Mr. Steskal of due process of law under the Fourteenth Amendment.

PENALTY-PHASE RETRIAL ISSUES

VI. THE EXECUTION OF PERSONS SUCH AS MAURICE STESKAL, WHO SUFFERED FROM SEVERE MENTAL ILLNESS AT THE TIME OF THEIR CRIMES, AND AS A RESULT WERE SUBSTANTIALLY IMPAIRED WITH RESPECT TO THOSE OFFENSES, IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS, AND IN ANY EVENT THE EXECUTION OF MAURICE STESKAL WOULD BE UNCONSTITUTIONALLY DISPROPORTIONATE TO HIS INDIVIDUAL CULPABILITY.

A. Introduction.

The Supreme Court has declared:

> When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.
>
> For these reasons we have explained that *capital punishment must be limited to those offenders* who commit "a narrow category of the most serious crimes" and *whose extreme culpability makes them "the most deserving of execution."*

Kennedy v. Louisiana (2008) 554 U.S. 407, 128 S. Ct. 2641, 2650, 171 L.Ed.2d 525 (emphasis added), quoting *Roper v. Simmons* (2005) 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319 122 S.Ct. 2242, 153 L.Ed.2d 335.

Substantial, uncontroverted penalty phase evidence demonstrated that, when Maurice Steskal killed Deputy Riches, he was suffering from severe mental illness. Maurice Steskal is psychotic. (30 RT 5668, 5673.) He suffers from a psychotic delusional disorder of the persecutory type, a DSM Axis I schizophrenic spectrum illness, as well as other diagnosed mental disorders. (30 RT 5668-5869, 5673.)

The evidence showed that Maurice Steskal's shooting of the deputy was the direct result of his psychosis. According to the uncontroverted testimony of forensic psychiatrist Dr. Roderick Pettis, on the night of the killing, Maurice Steskal was "grossly decompensated" (30 RT 5758), meaning "his psychosis has reached an extreme level. . . . He can't control his behavior." (30 RT 5759.) Maurice Steskal's severe mental illness substantially impaired his ability to appreciate the wrongfulness of his conduct, to exercise rational judgment in relation to his conduct, and to volitionally control his conduct and conform it to the requirements of law.

The execution of persons such as Maurice Steskal, who killed as a direct result of a severe mental illness, violates the Eighth Amendment of the United States Constitution and Article I, Section 17 of the California Constitution.

Moreover, the execution of Maurice Steskal is unconstitutional because it is disproportionate to his level of culpability.

B. Maurice Steskal Suffered from Severe Mental Illness at the Time of the Offense, and the Offense was the Direct Result of His Psychosis.

Maurice Steskal has suffered from mental illness since he was a child. At the time of the crime in this case, his psychosis was extreme.

Maurice Steskal's lifelong pattern of paranoid and irrational behavior developed against a background of horrific family dysfunction.

Maurice Steskal was raised in a familial environment of physical violence, under a father who sadistically beat his children. (25 RT 4883-4884, 4886-4901.) His father, Robert Steskal, Sr., had a personality disorder with paranoid, schizoid, narcissistic, and obsessive-compulsive

features (29 RT 5558-5563); he repeatedly beat Maurice, often with PVC hoses. (30 RT 5687.) Following their father's example of inflicting violence on Maurice, Maurice's older brother Robert Steskal, Jr., together with another older brother, Mark, singled out Maurice for "constant" physical abuse, and "constant" emotional abuse – which laster for eight or nine years, starting when Maurice was *three years old.* (25 RT 4917-4920.) The physical abuse included violence such as throwing a 1.5 lb. rock at the child's head, and striking him with a .12 gauge shotgun when Maurice was three years old, sending him to the hospital. (25 RT 4927-4929, 4940.)

Although his intelligence measured as normal, Maurice Steskal was dysfunctional at school from kindergarten on. School officials recommended that he repeat the kindergarten year. (28 RT 5316.) He failed again in first grade, and had to repeat first grade. (28 RT 5316.) Maurice Steskal's problems were <u>not</u> related to misconduct, or lack of effort (28 RT 5315); but school records indicate he was clumsy, had poor handwriting, and poor motor skills. (28 RT 5317.) In light of his normal intelligence, his severe problems at school were precursors of a range of psychiatric disorders; Maurice Steskal's early neuromotor impairments are of a type consistently associated specifically with liability to schizophrenic spectrum disorders. (28 RT 5322-5323.) After repeated failures, he dropped out of school after the 11th grade. (28 RT 5322, 5325.)

The crime at issue did not occur until Maurice Steskal was over 39 years old. (See 23 RT 4565.) He had no prior convictions for any crime of violence. But throughout his life as an adult, Maurice Steskal exhibited bizarre, deeply disturbed behaviors. For example, Maurice's sister, Annalisa LaCroix, testified that for two-and-a-half years during the 1990's, he lived alone in in a concrete bunker, in an isolated location in the Rogue

River region of Oregon, on the site of an abandoned mine. (34 RT 6482, 6510-6511, 6513, 6517.) She saw him digging a tunnel near the bunker, and he told her he needed it to escape from the people he believed were watching him, and following him, from within the woods. (34 RT 6519.) Every day, he would dig ten feet of tunnel with a pick-axe in this remote area. (34 RT 6519.) He said he camouflaged himself and went running through the woods at night to find out who was there. (34 RT 6523.) He told her that TV sets were built with cameras inside that them that could watch them. (34 RT 6520.) He told her that the police were watching him. (34 RT 6522-6523.)

Maurice Steskal did his best, and despite his difficulties was able to work doing menial labor for a sailboat builder on an hourly basis for about seven years. His employer Robert Eeg found Maurice Steskal to be a loyal and hard-working employee (28 RT 5447-5448), but one who couldn't handle the simplest tasks without direction, and was extremely paranoid, particularly with respect to local law enforcement. (28 RT 5454-5455.)

It may be understandable that an individual such as Maurice Steskal -- with a preexisting susceptibility to schizophrenic spectrum disorders, a childhood in which he was the victim of constant, severe and violent abuse at the hands of a sadistic father and two sadistic older brothers, a history of school failure, and a history of dysfunctional and bizarre behavior -- would develop paranoiac, suspicious and delusional beliefs regarding the perceived ill-will of persons in authority – and particularly, those in authority with the ability to employ coercive means such as violence, such as police officers – toward him personally.

But it is as certain as anything in human affairs ever is that, but for the traffic stop of Maurice Steskal by Deputy Andre Spencer of the Orange

County Sheriff's Department on March 28, 1999, Maurice Steskal would not have shot and killed Deputy Brad Riches on June 12, 1999.

Maurice Steskal's treatment at the hands of Deputy Spencer, and four other officers who – after a stop for failing to wear a seat belt – physically assaulted him, and physically degraded him, and verbally taunted and abused him, telling him "we want to hurt you" (Exhibits 39 and 39A), escalated Maurice Steskal's pre-existing mental illness into a state of extreme psychosis.[74] His fear of being followed, monitored, and observed, escalated into the psychotic delusion that the police were actually going to kill him.

Numerous witnesses testified to statements and behavior by Maurice Steskal, in the time after the March 28, 1999 stop by Deputy Spencer that harshly traumatized Maurice prior to the homicide, that clearly revealed serious mental disturbance. For example, Dave Rodering testified that Maurice Steskal was convinced the police were going to kill him. His voice would quaver, his body would shake, and he would burst into tears and say, "They are going to kill me, they are going to kill me." (27 RT 5199.) He told Rodering that the police were watching him via satellites and on his TV. (27 RT 5199.) Similarly, Cherie Le Brecht, who lived in the apartment with Maurice and his wife, felt he became obsessively paranoid in the period after the incident; he stated that he was being watched inside the apartment, through the television, and talked about conspiracies involving the government keeping files on everyone, including himself. (27 RT 5167.) According to Ralph Pantoni, Maurice talked a lot about Armageddon and the Apocalypse, and told Pantoni that the End of

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[74] That first stop by Deputy Spencer on March 28, 1999 was followed by a second stop of Maurice Steskal, also by Deputy Spencer, a few weeks later.

Times was "the real deal." (25 RT 4799-4800.) Maurice told Pantoni that he was being monitored with spy technology in the TV set, that he was being wiretapped and videotaped, and that he was constantly being surveilled by cameras. (25 RT 4807-4810, 4813-4815.) Expressing the fear that the coaxial box in the laundry room adjacent to his apartment was being used to spy on him, Maurice Steskal ripped out the box and tore all four cables apart. (25 RT 4851-4852.) His talk of suicide became more serious, and he would put a shotgun in his mouth, try to inhale hairspray, and try to drink Drano. (25 RT 4805-4806.)

These reports of Maurice Steskal's delusional beliefs and behaviors were consistent with the findings of mental health professionals. Dr. James Missett, a forensic psychiatrist, interviewed and clinically evaluated five members of Maurice Steskal's family – his mother, his father, two of his brothers and a sister. He found that four of them suffered from mental illness, including his brother, Scott, two years younger than Maurice, who suffered from a delusional disorder of the persecutory type. (29 RT 5518-5519, 5528, 5530, 5533.) This prevalence indicates a likelihood that other family members also suffer from the same or related disorders. (30 RT 5741-5742.)

Dr. Robert Asarnow, a neuropsychologist, administered a battery of 11 neuropsychological tests to Maurice Steskal; the results on a number of the tests were both consistent with his suffering from a schizophrenic spectrum disorder, and strongly indicative of such a disorder. (28 RT 5336, 5344, 5348, 5352, 5354, 5362-5365, 5379-5380.)

Dr. Roderick Pettis, a forensic psychiatrist, testified that at the time of the crime and thereafter, Maurice Steskal was psychotic. He suffered from an Axis I disorder – a major mental illness, delusional disorder,

persecutory type, with a secondary diagnosis of dysthymic [depressive] disorder. On Axis II, Maurice Steskal suffered from a schizotypal personality disorder. (30 RT 5668-5669, 5803.)[75]

Dr. Pettis testified that, on the night Maurice Steskal killed Deputy Brad Riches, Maurice Steskal was "grossly decompensated" (30 RT 5758), meaning "his psychosis has reached an extreme level. . . . He can't control himself. He can't control his behavior." (30 RT 5759.) This testimony was uncontradicted.

C. The Issue is Preserved for Appeal, and is Not Subject to Waiver or Forfeiture In Any Event.

The issue is preserved for appeal. At the hearing on the automatic motion to modify the verdict, defense counsel argued:

> MR. DAVIS: I think that the evidence that we put on through both of the cases showed that Mr. Steskal has been mentally ill, that he has been delusional and he has been delusionally paranoid for a number of years.
>
> I also believe that the evidence in this case shows that this would not have happened were it not for the fact that Mr. Steskal were mentally ill. *To execute a person who was -- whose crime was committed not while he was mentally ill, but because he was mentally ill* was, to use a turn of the phrase from the D.A., *it is less than fair, is less than moral and it is just wrong.*
>
> The court sat through these two trials. I will submit it on that.
>
> THE COURT: All right. Thank you.

(37 RT 7116-7117, emphasis added.)

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[75] Dr. Pettis was the only expert asked to render an opinion regarding whether Maurice Steskal actually suffered from psychosis at the time of the homicide.

Under this Court's caselaw, defense counsel's argument was sufficient to preserve the constitutional issues. As this Court explained in *People v. Farley* (2009) 46 Cal.4th 1053, 1095 (orig. emphasis):

> *People v. Partida* (2005) 37 Cal.4th 428 . . . held that constitutional arguments raised for the first time on appeal are not forfeited if they do not invoke reasons different from those the trial court was asked to apply, but merely assert that the trial court's act or omission, to the extent erroneous *for the reasons actually presented to that court*, "had the additional legal consequence of violating" the Constitution.

Here, the defense at trial "actually presented" to the court the argument that it would be unfair and morally unacceptable to execute appellant, when his serious mental illness caused his crimes. (37 RT 7116-7117.) The trial court's ruling on the motion to modify necessarily rejected the argument appellant made, and that rejection "had the additional legal consequence of violating" the federal and state constitutional guarantees of due process and equal protection of the laws, the cruel and unusual punishments clause of the Eighth Amendment, and Article I section 17 of the California Constitution, prohibiting cruel or unusual punishments.

Moreover, any express objection would have been futile, given the state of the law at the time, which did not hold that the execution of those who killed because they were severely mentally ill was unconstitutional. See *People v. De Santiago* (1969) 71 Cal.2d 18, 27-28 (court will not "place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections").

In any event, the issue may be reached and decided even without an objection of any sort, under two separate theories. First, the issue may be decided under this Court's law on intracase proportionality review. As stated in *People v. Anderson* (2001) 25 Cal.4th 543, 602 (emphasis added):

> the cruel or unusual punishment clause of the California Constitution (art. I, § 17) does entitle a capital defendant, on request, to intracase review by this court to determine whether the death penalty is grossly disproportionate to his personal culpability. (E.g., *Ayala, supra*, 23 Cal.4th 225, 304; *Ochoa, supra*, 19 Cal.4th 353, 478; *Williams, supra*, 16 Cal.4th 153, 279; *Arias, supra*, 13 Cal.4th 92, 193.)

Proportionality review is, of course, important to the Eighth Amendment inquiry. E.g., *Roper v. Simmons, supra*, 543 U.S. at p. 575 (holding that "the death penalty is disproportionate punishment for offenders under 18"). Here, the argument is that the death penalty is a constitutionally disproportionate punishment for offenders who suffered from severe mental illness at the time of their offenses, when that mental illness caused substantial impairment with respect to the offense. As applied to Maurice Steskal, it is an argument that, because he comes within that category of severely mentally ill offenders, the death penalty is disproportionate to his personal culpability.

Maurice Steskal alternatively argues that, even without regard to the categorical constitutional prohibition on executing the severely mentally ill, on the facts of this case Maurice Steskal's personal culpability is so diminished by his severe mental illness that the penalty of death is grossly disproportionate, and thus unconstitutional.

Maurice Steskal specifically requests this Court's independent review for intracase proportionality under both constitutions.

Second, as this Court has explained:

> A sentence is said to be unauthorized if it cannot "lawfully be imposed under any circumstance in the particular case" (*Scott, supra*, 9 Cal.4th at p. 354), and therefore is reviewable "regardless of whether an objection or argument was raised in the trial and/or reviewing court." (*Welch*, at p. 235; see *Smith*, at p. 852.)

In re Sheena K. (2007) 40 Cal.4th 875, 887. In this case, because the sentence of death for severely mentally ill persons such as Maurice Steskal is unconstitutional, it cannot lawfully be imposed under any circumstance in this particular case, and the sentence is reviewable "regardless of whether an objection or argument was raised in the trial" court. *Id.*

D. The Supreme Court's Eighth Amendment Analytic Methodology.

In *Graham v. Florida* (2010) 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825, the Supreme Court held that the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide offense. In so doing, the Court took the opportunity to restate its analytic methodology:

> The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910).
>
> The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.

Graham v. Florida, supra, 176 L.Ed.2d at pp. 835-836. The Court addressed case-law in the first category, including *Solem v. Helm* (1983) 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 and *Harmelin v. Michigan* (1991) 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836, and then turned to the second category:

> The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. The classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender. With respect to the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. *Kennedy*, *supra,* at __, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (slip op., at 28); see also *Enmund* v. *Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); *Coker* v. *Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977). In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, *Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), or whose intellectual functioning is in a low range, *Atkins* v. *Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). See also *Thompson* v. *Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988).

Graham v. Florida, supra, 176 L.Ed.2d at pp. 836-837. The *Graham* Court then summed up its analytic methodology:

> In the cases adopting categorical rules the Court has taken the following approach. The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. *Roper*, *supra,* at 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," *Kennedy*, 554 U.S., at ___, 128 S. Ct. 2641, 2650, 171 L. Ed. 2d 525, 540, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper, supra*, at 564, 125 S. Ct. 1183, 161 L. Ed. 2d 1.

Graham v. Florida, supra, 176 L.Ed.2d at p. 837.

While there are two steps in the Court's Eighth Amendment proportionality jurisprudence, they are not of equal weight or importance. The Court has explained that it is the second step that is critical:

> Community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. *Kennedy*, 554 U.S., at ___, 128 S. Ct. 2641, 2658, 171 L. Ed. 2d 525, 548. In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains our responsibility." *Roper*, 543 U.S., at 575, 125 S. Ct. 1183, 161 L. Ed. 2d 1. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. *Id.*, at 568, 125 S. Ct. 1183, 161 L. Ed. 2d 1; *Kennedy*, *supra,* at ___, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (slip op., at 27-28); cf. *Solem*, 463 U.S., at 292, 103 S. Ct. 3001, 77 L. Ed. 2d 637. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. *Kennedy*, *supra,* at ___, 128 S. Ct. 2641, 2662, 171 L. Ed. 2d 525, 552); *Roper*, *supra,* at 571-572, 125 S. Ct. 1183, 161 L. Ed. 2d 1; *Atkins*, *supra,* at 318-320, 122 S. Ct. 2242, 153 L. Ed. 2d 335.

Graham v. Florida, supra, 176 L.Ed.2d at p. 841.

The unmistakable implication from the Court's cases is that evidence of a national consensus against the sentencing practice at issue is significant, but is <u>not</u> necessary to a conclusion the practice violates the Eighth Amendment.[76]

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[76] Indeed, the dissenting Justices in *Atkins* regarded the Court's effort to ascertain a consensus in that case as an inoperative part of its analysis – mere window-dressing. Justice Scalia, dissenting in *Atkins*, noted, "[t]he genuinely operative portion of the opinion, then, is the Court's statement of the reasons why it agrees . . . that the 'diminished capacities' of the mentally retarded render the death penalty excessive." *Atkins, supra*, 536 U.S. at p. 349 (dis. opn. of Scalia, J.). Chief Justice Rehnquist wrote: "the Court's assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency." *Atkins, supra*, 536 U.S. at p. 322 (dis. opn. of Rehnquist, C.J.).

The dissenting Justices in *Roper* echoed this analysis. Justice O'Connor emphasized that "the rule decreed by the Court rests, ultimately, on its independent moral judgment," and not on any evidence of a national

E. There is a National Consensus that Severely Mentally Ill Defendants Should Not Face the Death Penalty.

Even though a showing that there is a national consensus against execution of the severely mentally ill is not required, there is ample evidence demonstrating the existence of such a consensus.

1. The Legal Consensus.

Unlike California, *the **majority** of American jurisdictions do not apply the death penalty to defendants such as Maurice Steskal who were, as a result of severe mental illness at the time of their crimes, unable to conform their conduct to the law.*[77]

First, it is significant to the national consensus that 18 states, and the District of Columbia and the Commonwealth of Puerto Rico,[78] have no

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consensus. *Roper, supra*, 543 U.S. at p. 588 (dis. opn. of O'Connor, J.). Justice Scalia charged that the evidence of a national consensus against the execution of juveniles was based "on the flimsiest of grounds," and that "the real force driving today's decision is not the actions of . . . state legislatures, but the Court's "'own judgment'" that the death penalty for juveniles was disproportionate. *Roper, supra*, 543 U.S. at pp. 608, 615 (dis. opn. of Scalia, J.). See also *Graham v. Florida, supra*, 176 L.Ed.2d at p. 863 (dis. opn. of Thomas, J.) ("the Court is not content to rely on snapshots of community consensus in any event. . . . Instead, it reserves the right to reject the evidence of consensus it finds whenever its own 'independent judgment' points in a different direction.").

[77] California does *not* exempt from criminal liability persons who were, as a result of mental illness, unable to conform their conduct to the law (i.e., those subject to volitional incapacity). See *People v. Skinner* (1985) 39 Cal.3d 765; Penal Code section 25, subdivision (b).

[78] Puerto Rico, like the District of Columbia, has legal status akin to that of a state. Persons born in Puerto Rico are U.S. citizens (18 U.S.C. section 1402), pay federal taxes, and participate in Social Security. See generally *Torres v. Puerto Rico* (1979) 442 U.S. 465, 99 S.Ct. 2425, 61 L.Ed.2d 1.

death penalty under any circumstances.[79] Thus, these twenty jurisdictions contribute to the consensus against the death penalty for the severely mentally ill.

Next, numerous states exempt from any criminal liability whatsoever severely mentally ill defendants who cannot conform their conduct to the law, and are thus volitionally incapacitated. As explained by the Supreme Court in *Clark v. Arizona* (2006) 548 U.S. 735, 126 S.Ct. 2709, 165 L.Ed.2d 842:

> The volitional incapacity or irresistible-impulse test . . . asks whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions. And the product-of-mental-illness test was used as early as 1870, and simply asks whether a person's action was a product of a mental disease or defect. . . . Fourteen jurisdictions, inspired by the Model Penal Code, have in place an amalgam of the volitional incapacity test and some variant of the moral incapacity test, satisfaction of either (generally by showing a defendant's substantial lack of capacity) being enough to excuse. Three States combine a full *M'Naghten* test with a volitional incapacity formula. And New Hampshire alone stands by the product-of-mental-illness test.

Clark v. Arizona, supra, 548 U.S. at pp. 749-751 (footnotes omitted).

Thus, according to the Supreme Court, in eighteen States a criminal defendant who was unable to conform his conduct to the requirements of the law is not only not eligible for the death penalty, but is entirely exempt from any criminal liability whatsoever.[80]

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[79] See Death Penalty Information Center, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last accessed June 25, 2014). Since 2009, Connecticut, Maryland and New Mexico have abolished the death penalty, but not retroactively. *Id.*

[80] New Hampshire is included in the total of eighteen states because the class of defendants whose acts were the product of mental illness is necessarily broader than, and inclusive of, the class of defendants who could not conform their conduct to the requirements of the law.

The eleven states that legislatively prohibit any punishment of these severely mentally ill persons are Arkansas (Ark. Stat. Ann. section 5-2-312); Connecticut (Conn. Gen. Stat. section 53a-13); Georgia (Ga. Code Ann. section 16-3-2 (1996)); Hawaii (Haw. Rev. Stat. section 704-400 (1996)); Kentucky (Ky. Rev. Stat. Ann. section 504.020); Maryland (Md. Code Ann., Crim. Proc. section 3-109); Michigan (Mich. Comp. Laws Ann. section 768.36); Oregon (Or. Rev. Stat. section 161.295); Vermont (13 Vt.. Stat. Ann. section 4801); Wisconsin (Wis. Stat. 971.15); and Wyoming (Wyo. Stat. 7-11-304). In addition, New Hampshire, as noted by the Supreme Court in *Clark*, *supra*, 548 U.S. at p. 751, has adopted by caselaw the product-of-mental-illness test. *State v. Plante* (1991) 134 N.H. 456, 594 A.2d 1279.[81]

Six of these twelve states – Arkansas, Georgia, Kentucky, New Hampshire, Oregon and Wyoming – have the death penalty.[82]

In addition, in Virginia a person who is volitionally incapacitated, and thus unable to conform his conduct to the law, is also exempt from criminal punishment. *Orndorff v. Commonwealth* (Va. 2010) 691 S.E.2d 177, 179 fn. 5. Virginia has the death penalty.

Thus, in twenty-seven of fifty-two jurisdictions – twenty that entirely prohibit the death penalty, and seven that prohibit criminal punishment for the volitionally-incapacitated -- the law does not permit a sentence of death

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[81] Additionally, as noted by the Supreme Court in *Clark*, four jurisdictions have adopted the volitional incapacity test via precedent. These are the District of Columbia, Massachusetts, Rhode Island and West Virginia. None of these jurisdictions has the death penalty.

[82] As noted above, since 2009 two states on the twelve-state list, Connecticut and Maryland, have abolished the death penalty, though not retroactively.

for persons who were severely mentally ill at the time of their crimes, and as a result were unable to conform their conduct to the law.

But there is even more to this majority consensus against the death penalty for the severely mentally ill.

In at least five additional states -- Arizona, Florida, Mississippi, Ohio, and Nevada — proportionality review has served to remove many mentally ill offenders from the ranks of the condemned despite the apparent availability of capital punishment in such cases. See e.g,, *State v. Jimenez* (Ariz. 1990) 799 P.2d 785, 797-801 [reducing death sentence to life imprisonment based on defendant's mental incapacity]; *State v. Fierro* (Ariz. 1990) 804 P.2d 72 (Ariz. 1990) [death penalty held disproportionate due in part to defendant's "history of psychological illness"]; *State v. Doss* (Ariz. 1977) 568 P.2d 1054, 1061 [same]; *Offord v. State* (Fla. 2007) 959 So.2d 187, 193 [sentence reduced to life imprisonment when defendant's capacity to conform his conduct to the requirements of law was substantially impaired due to severe mental illness]; *Jones v. State* (Fla. 1976) 332 So.2d 615, 619 [reducing death sentence to life based on evidence of defendant's mental illness]; *Burch v. State* 343 So.2d 831 (Fla. 1977) [same]; *Huckaby v. State* 343 So.2d 29 (Fla. 1977) [evidence of mental illness outweighed evidence in aggravation and required reduction of sentence from death to life imprisonment; while defendant "may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired"]; *Knowles v. State* (Fla. 1993) 632 So.2d 62 [mitigating factors of defendant's mental illness, including his impaired capacity to control his conduct outweighed aggravating factors]; *Besaraba v. State* (Fla. 1995) 656 So.2d 441

[death sentence overturned where defendant was under the influence of great emotional disturbance]; *State v. Claytor* (1991) 61 Ohio St.3d 234, 574 N.E.2d 472 [where defendant produced unrebutted evidence that he lacked substantial capacity to conform, impact of that mitigating factor should have been given more weight and a life sentence imposed]; *Edwards v. State* (Miss. 1983) 441 So.2d 84, 92-94 (plurality opinion) [vacating death sentence based on offender's mental illness]; *Haynes v. State* (1987) 103 Nev. 309, 739 P.2d 497 [vacating as disproportionate death sentence imposed on mentally ill offender].

Adding these five jurisdictions to the twenty-seven jurisdictions that do not permit the death penalty for the severely mentally ill, including those that do not apply the death penalty at all, we arrive at a total of thirty-two out of fifty-two jurisdictions that do not authorize the death penalty to be imposed on the severely mentally ill.

In *Roper*, the Supreme Court invalidated the death penalty for juveniles after determining that a national consensus against the practice existed. The *Roper* Court summarized the consensus in *Atkins* and the case before it as follows:

> When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. 536 U.S., at 313-315, 153 L.Ed.2d 335, 122 S.Ct. 2242. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.

Roper v. Simmons, supra, 543 U.S. at p. 564.

The consensus is comparable against capital punishment of the severely mentally ill.

2. The Broader Social and Professional Consensus.

Moreover, the Court has made clear that a consensus can be substantially reinforced by evidence of a "broader social and professional consensus," which can include the official positions of professional "organizations with germane expertise," the views of the international community, and polling data reflecting the views of the citizenry. *Atkins, supra*, 536 U.S. at p. 316 fn. 21. In *Atkins* itself, the Court found meaningful support for its conclusion of a consensus against execution of the mentally retarded in all these sources. *Id.*[83]

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[83] The *Atkins* Court wrote:

> Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as *Amici Curiae*; Brief for AAMR et al. as *Amici Curiae*. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." See Brief for United States Catholic Conference et al. as *Amici Curiae* in *McCarver* v. *North Carolina,* O. T. 2001, No. 00-8727, p. 2. Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for The European Union as *Amicus Curiae* in *McCarver* v. *North Carolina*, O. T. 2001, No. 00-8727, p. 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.

Atkins, supra, 536 U.S. at p. 316 fn. 21.

Just as with mental retardation in *Atkins,* there is a consensus of professional organizations with germane expertise that the death penalty should not be imposed on the severely mentally ill. The American Bar Association has taken the position that the death penalty should not be imposed on persons who were severely mentally ill at the time of their offenses. American Bar Association, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities* (2006) 30 Mental & Phys. Disability L. Rep. 668, 668 (see discussion at pp. 177-178, *infra*). Almost identical resolutions have been adopted by the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill.[84]

As with execution of the intellectually disabled, within the world community the imposition of the death penalty for crimes committed by mentally ill offenders is overwhelmingly disapproved. See discussion at pp. 182-184, *infra.*

As in *Atkins,* polling of the citizens of this country makes clear that Americans overwhelmingly reject death as punishment for the mentally ill.

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[84] Am. Psychiatric Ass'n, Position Statement on Diminished Responsibility in Capital Sentencing (2004), available at http://www.psychiatry.org/advocacy--newsroom/position-statements (last visited March 30, 2014); National Alliance for the Mentally Ill, Policy Platform: Criminal Justice and Forensic Issues, Section 10.9, available at http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=41302 (last visited March 30, 2014); American Psychological Association, Council of Representatives, Approved Minutes, Section IV.B.5, available at http://www.apa.org/about/governance/council/crminutef06.pdf (last visited March 30, 2014).

According to a Gallup Poll taken in 2002 -- apparently the most recent poll taken on this issue[85] -- 75 percent of those surveyed opposed executing the mentally ill, while only 19 percent supported it. The Gallup Poll surveyed 1,012 Americans across the country on May 6-9, 2002, with a margin of error of 3 points plus or minus. See PollingReport.com, http://www.pollingreport.com/crime2.htm (last visited March 31, 2014). This consensus against execution of the mentally ill is fortified when it is noted that the question did not limit itself to the "severely" mentally ill, but simply asked, "Do you favor or oppose the death penalty for the mentally ill?" Moreover, the public consensus against executing the mentally ill, at 75%, was quite similar to the public consensus against executing the mentally retarded, at 82%, and statistically nearly-identical at the margins of error. *Id.*

Accordingly, although it is not required for Eighth Amendment purposes, there is a national consensus that severely mentally ill defendants who are unable to conform their conduct to the requirements of the law should not receive the death penalty.

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[85] The Gallup Poll survey is found at PollingReport.com, which "contain[s] state-by-state data from election and issue polling: campaign polls, media polls, academic polls, and polls by political, business and public-interest groups." http://www.pollingreport.com/nletter.htm (last visited March 31, 2014). The website takes its data from primary sources only, not news reports. *Id.*

The determination that the Gallup Poll of May 2002 is the most recent poll on the subject of mental illness and the death penalty was made by viewing the poll results for polls on crime, listed in reverse chronological order at http://www.pollingreport.com/crime.htm (last visited March 31, 2014).

F. The Penological Rationales for Capital Punishment, Retribution and Deterrence, and the "Special Risk of Wrongful Execution."

1. Retribution and deterrence.

In *Penry v. Lynaugh* (1989) 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256, the Supreme Court held that the execution of the mentally retarded did not offend the Eighth Amendment. In *Atkins v. Virginia, supra,* 536 U.S. 304, the Supreme Court overruled *Penry*, holding that the execution of the mentally retarded violated the Eighth Amendment. The *Atkins* Court noted that capital punishment has two penological justifications, retribution and deterrence, and:

> there is a serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders. *Gregg* v. *Georgia,* 428 U.S. 153, 183, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976), identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund,* 458 U.S. at 798.

Atkins, *supra,* 536 U.S. at pp. 318-319. As to the justification of retribution, the Court stated:

> the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg,* our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey* v. *Georgia,* 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.,* at 433. *If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded*

> *offender surely does not merit that form of retribution*. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

Atkins, *supra,* 536 U.S. at p. 319 (emphasis added). As to the justification of deterrence, the Court found:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable -- for example, ***the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses*** -- that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

Atkins, *supra,* 536 U.S. at p. 320.

Three years later, in *Roper v. Simmons, supra,* 543 U.S. 551, the Court categorically banned the death penalty for persons who were juveniles when they committed their crimes, overruling *Stanford v. Kentucky* (1989) 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306. After surveying the consensus against the death penalty for juveniles, the Court then turned to the "exercise of our own independent judgment" in determining that the death penalty for juveniles categorically violated the Eighth Amendment. *Roper v. Simmons, supra,* 543 U.S. at p. 564.

The *Roper* Court found:

> As for retribution, we remarked in *Atkins* that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the

> mentally retarded offender surely does not merit that form of retribution." 536 U.S., at 319, 153 L. Ed. 2d 335, 122 S. Ct. 2242. The same conclusions follow from the lesser culpability of the juvenile offender. Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

Roper, supra, 543 U.S. at p. 571. Regarding deterrence, the *Roper* Court stated:

> it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes, see *Harmelin* v. *Michigan*, 501 U.S. 957, 998-999, 115 L.Ed.2d 836, 111 S.Ct. 2680 (1991) (Kennedy, J., concurring in part and concurring in judgment). Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, as the plurality observed in *Thompson*, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." 487 U.S., at 837, 101 L.Ed.2d 702, 108 S.Ct. 2687.

Roper, supra, 543 U.S. at pp. 571-572.

Three Terms later, in *Kennedy v. Louisiana, supra,* 128 S.Ct. 2641, the Court invalidated the death penalty for individuals convicted of child rape but not murder. The Court stated that "capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Id.* at p. 2661.

In *Graham v. Florida, supra,* 560 U.S. 48, the Court held that the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide offense. In so doing, the Court reaffirmed the vitality of its approach in *Roper*, finding that neither retribution nor deterrence justified the practice at issue. 176 L.Ed.2d at pp. 843-844.[86]

2. The "special risk of wrongful execution."

The Supreme Court in *Atkins* identified a further, distinct reason why the mentally retarded should be categorically exempt from the penalty of death:

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett* v. *Ohio*, 438 U.S. 586, 605, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. 492 U.S. at 323-325, 106 L.Ed.2d 256, 109 S.Ct.

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[86] More recently, in *Miller v. Alabama* (2012) 132 S.Ct. 2455, 183 L.Ed.2d 407, the Supreme Court held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments.

And even more recently, in *Hall v. Florida* (2014) 134 S.Ct. 1986, 188 L.Ed.2d 1007, 2014 U.S. LEXIS 3615, the high court, applying *Atkins*, held that a state's automatic cut-off rule requiring that a prisoner show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability was unconstitutional.

2934. Mentally retarded defendants in the aggregate face ***a special risk of wrongful execution***.

Atkins, *supra,* 536 U.S. at pp. 320-321 (footnote omitted) (emphasis added); accord, *Hall v. Florida*, *supra,* 2014 U.S. LEXIS 3615, 15 (quoting *Atkins* as to the "special risk of wrongful execution" of the intellectually disabled). (In *Hall v. Florida*, the Supreme Court adopted the term "intellectually disabled" to describe the condition of persons formerly described as "mentally retarded." *Hall v. Florida*, *supra*, 2014 U.S. LEXIS 3615, at p. 7.)

G. Because of the Reduced Culpability and Diminished Deterrability of Severely Mentally Ill Offenders, and the "Special Risk of Wrongful Execution," Capital Punishment for Such Offenders is Disproportionate and Unconstitutional.

On its face, the core reasoning of *Atkins v. Virginia* with respect to intellectual disability applies equally to severe mental illness. Indeed, two Justices of this Court have addressed the applicability of the reasoning in *Atkins* to an offender who was severely mentally ill at the time of the crime.

In *People v. Danks* (2004) 32 Cal.4th 269, Justice Kennard, dissenting from the affirmance of the death penalty, and joined by Chief Justice George, explicitly analogized a severe mental illness to mental retardation under *Atkins*. In the context of discussing evidence a reasonable juror might have considered in that case, Justice Kennard wrote:

> If defendant's doctors are right, defendant's mental deficiencies are comparable in severity to mental retardation. In *Atkins v. Virginia* (2002) 536 U.S. 304, the United States Supreme Court held that to execute the mentally retarded is cruel and unusual punishment, reasoning that retarded persons ***"have diminished capacities to understand and process information, to***

> ***communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."*** (*Id.* at p. 318.) ***The same mental capacities are impaired in a person suffering from paranoid schizophrenia, and the impairment may be equally grave.***
> . . .

People v. Danks, supra, 32 Cal.4th at p. 322 (conc. & dis. opn. of Kennard, J.) (emphasis added).[87] See also *State v. Nelson* (N.J. 2002) 803 A.2d 1, 47 (conc. opn. of Zappala, J.) (applying the reasoning of *Atkins* to a severely mentally ill defendant as a matter of state constitutional law).

The same reasoning that led the Court in *Atkins* and *Roper* to find that the dual purposes of capital punishment – retribution and deterrence – are not adequately justified when imposed on intellectually disabled persons or on those who were juveniles at the time of their crimes also leads to the conclusion that the goals of retribution and deterrence would not be justified to any greater extent in the case of defendants who suffered from severe mental illness at the time of their offenses, and whose illness resulted in impairments directly related to the crimes. Similarly, the "special risk of wrongful execution" that the Court identified as a separate reason to invalidate the death penalty for intellectually disabled individuals in *Atkins* also applies to severely mentally ill individuals such as Maurice Steskal.

It is helpful at this point to consider what types of severe mental illness are comparable to intellectual disablity and juvenile status for the purposes of assessing whether the punishment of death is constitutionally excessive.

Mental illness is not a unitary concept, and not all mental illnesses should or will qualify for a categorical exemption, such as with mental

[87] Justice Moreno dissented from the penalty affirmance on separate grounds, and did not mention *Atkins*; nor did the majority.

retardation. The American Bar Association has proposed model legislation that defines the category of severely mentally ill persons who should not face the ultimate punishment:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) *to appreciate the nature, consequences or wrongfulness of their conduct*, (b) *to exercise rational judgment in relation to conduct*, or (c) *to conform their conduct to the requirements of the law*. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

American Bar Association, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, supra*, 30 Mental & Phys. Disability L. Rep. at p. 668 (emphasis added).

The American Bar Association Report addressed the meaning of the term "severe mental disorder":

> [T]he predicate for exclusion from capital punishment under this part of the Recommendation is that offenders have a "severe" disorder or disability, which is meant to signify a disorder that is roughly equivalent to *disorders that mental health professionals would consider the most serious "Axis I diagnoses."* These disorders include schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders—with schizophrenia being by far the most common disorder seen in capital defendants. In their acute state, all of *these disorders are typically associated with delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment*.

ABA Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, at p. 670 (emphasis added) (footnotes omitted), citing to American Psychiatric Association, *Diagnostic and Statistical Manual of*

Mental Disorders (text rev. 4th ed. 2000) (*DSM-IV-TR*), pp. 25-26 (distinguishing Axis I diagnoses from Axis II diagnoses); pp. 275-276 (schizophrenia); p. 301 (delusional disorders); pp. 332-333 (mood disorder with psychotic features); p. 125 (delirium); p. 477 (dissociative disorders).[88]

The American Bar Association's formulation usefully distinguishes those mentally ill offenders whose illness is of a severity and type that should constitutionally preclude their execution.

The objective of retribution is not served by executing those who were severely mentally ill at the time of the offense. The rationale of the United States Supreme Court's acceptance in *Atkins* that intellectually disabled murderers are categorically so lacking in moral blameworthiness as to be ineligible for the death penalty should lead to the conclusion that the severely mentally ill are likewise ineligible. In *Atkins,* the United States Supreme Court noted the obvious cognitive limitations of the intellectually disabled, but also stressed their "diminished capacities ... to control impulses," and the "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan," characterizations that have equal applicability to those who suffered from severe mental illness at the time of the offense. *Atkins, supra,* 318. In *Roper*, the Supreme Court observed that ""[a] lack of maturity and an underdeveloped sense of responsibility are

[88] As of 2013, there is a more recent edition of the *DSM.* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (text rev. 5th ed. 2013) (*DSM-5*). While a number of changes have been made in the newer edition, including the retirement of the "axis" terminology to indicate severity, the basic diagnostic categories pertaining to psychosis remain (e.g., the classifications of schizophrenia spectrum and other psychotic disorders, including delusional disorders). See "Highlights of Changes from DSM-IV-TR to DSM-5," American Psychiatric Association, available at http://www.dsm5.org/Documents/Schizophrenia%20Fact%20Sheet.pdf (last visited July 16, 2014).

found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Roper, supra*, 543 U.S. at p. 569. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* at p. 570.

Moreover, lessened emotional or volitional control was a central component of the United States Supreme Court's determination that the execution of persons under the age of sixteen violates the Cruel and Unusual Punishments Clause. See *Thompson v. Oklahoma* (1988) 487 U.S. 815, 834, 108 S.Ct. 2687, 101 L.Ed.2d 702 ("Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they *deserve* less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults" (emphasis added)). If juveniles and the intellectually disabled warrant exemption from capital punishment due to their reduced impulse control, so, too, do persons who were severely mentally ill at the time of the offense.

The fear of execution, even assuming it deters *some* would-be murderers, cannot plausibly be thought to deter severely mentally ill persons. In *Thompson v. Oklahoma,* the United States Supreme Court observed that, for murderers under the age of sixteen, "the likelihood that the ... offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Thompson, supra*, 487 U.S. at p. 837. In *Atkins,* the Court said that, for mentally retarded offenders, the "cold calculus" of cost and benefit is "at the opposite end of the spectrum from behavior." *Atkins, supra,* 536 U.S. at p. 319. The same must be said about those who were severely mentally ill at

the time of their offenses. As with juveniles and the intellectually disabled, the severely mentally ill will not be deterred by the threat of capital punishment. Moreover, as the Court said about the intellectually disabled in *Atkins,* exempting the severely mentally ill from capital punishment will not lessen the deterrent effect upon offenders who are not mentally ill and do not suffer from reduced impulse control. *Id.* at p. 320.

As discussed previously, in *Atkins,* the Court cited the enhanced risk faced by intellectually disabled defendants "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" as another justification for holding that they should be categorically excluded from eligibility for the death penalty. *Atkins, supra,* 536 U.S. at p. 320, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973.

Severely mentally ill defendants such as Maurice Steskal face similar obstacles in "mak[ing] a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." *Atkins, supra,* 536 U.S. at p. 320. Severe mental illness, like intellectual disability, sharply constricts a defendant's ability" to give meaningful assistance to [his] counsel." *Id.* at p. 320. The National Mental Health Association "believes that mental illness can influence an individual's mental state at the time he or she commits a crime, can affect how 'voluntary' and reliable an individual's statements might be, can compromise a person's competence to stand trial and to waive his or her rights, and may have an effect upon a person's knowledge of the criminal justice system." http://www.nmha.org/positions/death-penalty (last visited March 31, 2014).

In addition, as with intellectual disability, severe mental illness "can be a two-edged sword that may enhance the likelihood that the aggravating [fact] of future dangerousness will be found by the jury." *Atkins, supra,* 536 U.S. at p. 321. See, e.g., *Boyle v. Johnson* (5th Cir. 1996) 93 F.3d 180, 187-188 (attorney's decision not to pursue mental health defense or to present mitigating evidence concerning the defendant's possible mental illness was reasonable where counsel was concerned that such testimony would not be viewed as mitigating by the jury and that the prosecution might respond to such testimony by putting on its own psychiatric testimony regarding the defendant's violent tendencies). Allowing jurors to consider evidence of severe mental illness does not adequately protect against the danger of that two-edged sword:

> while extreme mental or emotional distress and other abnormal mental conditions are usually explicitly recognized as mitigating factors in capital sentencing statutes, *research suggests that presentation of such evidence often acts as an aggravating factor*. Apparently, sentencing juries and judges focus more on the perceived dangerousness of such individuals than on their diminished capacity and deterrability.

See Slobogin, *What Atkins Could Mean for People with Mental Illness* (2003) 33 N.M. L. Rev. 293, 305 (emphasis added), *citing* Slobogin, Mental Illness and the Death Penalty (2000) 1 Cal. Crim. L. Rev., art. 3, (citations omitted); see Garvey, *The Emotional Economy of Capital Sentencing* (2000) 75 N.Y.U. L. Rev. 26, 57-58 & tbl. 7 (analysis of Capital Jury Project data); Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence* (1994) 8 Notre Dame J.L. Ethics & Pub. Pol'y 239, 241-42 ("A review of case law, controlled behavioral research and 'real life' research... tends to reveal [among other things]... that jurors... see [mental disability evidence] as a mitigating

factor only in a handful of circumscribed situations (most of which are far removed from the typical scenario in a death penalty case)....")

In short, it is not enough to allow jury consideration of mental illness as mitigation, because mental illness, like intellectual disability, can be "a two-edged sword." *Atkins*, *supra,* 536 U.S. at p. 321 Rather, as with intellectual disability, this Court should read the Eighth Amendment and Article I Section 17 to contain a categorical exemption for those who were severely mentally ill at the time of their offense.

H. International Law Supports the Conclusion that Execution of The Severely Mentally Ill is Impermissible Punishment.

In *Graham v. Florida, supra*, the Court determined that a sentence of life without the possibility of parole for juveniles who had committed non-homicide crimes was constitutionally impermissible. In arriving at that judgment, the Court's reasoning was informed by international law and practice. The Court stated:

> There is support for our conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over. This observation does not control our decision. The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But "'[t]he climate of international opinion concerning the acceptability of a particular punishment'" is also "'not irrelevant.'" *Enmund*, 458 U.S., at 796, n. 22, 102 S.Ct. 3368, 73 L.Ed.2d 1140. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. See, *e.g., Roper*, 543 U.S., at 575-578, 125 S. Ct. 1183, 161 L. Ed. 2d 1; *Atkins*, *supra,* at 317-318, n. 21, 122 S. Ct. 2242, 153 L. Ed. 2d 335; *Thompson*, 487 U.S., at 830, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (plurality opinion); *Enmund*, *supra,* at 796-797, n. 22, 102 S. Ct. 3368, 73 L. Ed. 2d 1140; *Coker*,

> 433 U.S., at 596, n. 10, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (plurality opinion); *Trop*, 356 U.S., at 102-103, 78 S. Ct. 590, 2 L. Ed. 2d 630 (plurality opinion).
>
> Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question.

Graham v. Florida, supra, 176 L.Ed.2d at pp. 848-849.

There is also a global consensus against the sentencing practice in question here, imposing the death penalty on persons who are severely mentally ill. As a law review note indicates,

> [T]he U.N. Commission on Human Rights passed a resolution in 1999 urging countries "not to impose the death penalty on a person suffering from any form of mental disorder." In 2004, it passed another resolution concerning the death penalty, using the same language to call on nations that still maintain the death penalty to stop imposing it on individuals with any form of mental disorder. . . .

Shin, Note, *Is the Death of the Death Penalty Near? The Impact of* Atkins *and* Roper *on the Future of Capital Punishment for Mentally Ill Defendants* (2007) 76 Fordham L. Rev. 465, 506, citing Question of the Death Penalty, U.N. Comm'n on Human Rights Res. 2004/67, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004). In 2005, the U.N. Commission on Human Rights passed another resolution, again urging states that still imposed the death penalty not to do so on persons with any form of mental disorder. Question of the Death Penalty, U.N. Comm'n on Human Rights, Human Rights Resolution 2005/59, U.N. Doc. E/CN.4/RES/2005/59 (April 20, 2005).

> In 1997, the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions stated in a report that governments that continue to use capital punishment on "the mentally ill are particularly called upon to bring their domestic legislation into conformity with international legal standards." U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Extrajudicial,

Summary or Arbitrary Executions, ¶ 117, U.N. Doc. E/CN.4/1998/68 (Dec. 23, 1997)

Shin, Note, *supra*, 76 Fordham L. Rev. at p. 506.

The international consensus against executing the severely mentally ill fortifies the national consensus, and further strengthens the conclusion that this sentencing practice is disproportionate, not in conformance with contemporary standards of decency or justice, and constitutionally impermissible.

I. The Execution of the Severely Mentally Ill Violates Federal and State Guarantees of Equal Protection.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313.

As we have seen, the Supreme Court has categorically prohibited the execution of the intellectually disabled, and of persons who were juveniles at the time of their crimes, in *Atkins* and *Roper*, respectively, based on the reduced culpability and the diminished deterrability of members of these two groups. As further demonstrated above, people who suffered from severe mental illness at the time of their offenses and as a result were substantially impaired with respect to those offenses also have reduced culpability and diminished deterrability. Thus, with respect to capital punishment, juveniles, the intellectually disabled, and the severely mentally ill are similarly situated.

Under the equal protection standard, a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center, supra,* 473 U.S. at p. 446. The only possible basis for distinguishing the intellectually disabled from the severely mentally ill in determining who is to be executed is a determination that the severely mentally ill are somehow more deserving of capital punishment that the intellectually disabled. Yet, as demonstrated above, with respect to the recognized penological objectives of capital punishment – retribution and deterrence – the severely mentally ill are similarly situated to the intellectually disabled. There is simply no rational basis for a life-and-death distinction. See Slobogin, *What Atkins Could Mean for People with Mental Illness, supra,* 33 N.M. L. Rev. 293 (arguing the effects of mental retardation and serious mental illness are so similar as to eliminate any rational basis for distinguishing between the two categories of defendants); Batey, *Categorical Bars to Execution: Civilizing the Death Penalty* (2009) 45 Houston L.Rev. 1493, 1522-1527.

Accordingly, this Court should hold that the execution of the severely mentally ill violates the equal protection guarantees of the United States and California constitutions.[89]

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[89] However, as indicated *supra* and in the next sub-section, the Court need not go that far to achieve the correct result in this case. Under precedents such as *People v. Anderson, supra,* 25 Cal.4th at p. 602, the Court conducts an individualized intracase proportionality review, under which it has the power to determine that the death penalty is disproportionate in any given case. Due to Maurice Steskal's severe mental illness, the Court should hold the penalty disproportionate in this case.

J. The Court Should Reverse or Modify the Judgment in This Case to Strike the Death Penalty.

In this case, because the trial court erroneously denied the motion to modify the verdict, over a defense objection sufficient to raise the constitutional issues, and because the sentence of death in this case violates the Eighth Amendment and Article I section 17 of the state constitution, as well as the equal protection clauses of both constitutions, the Court should reverse the judgment of death.

Moreover, as noted above, the California Constitution "entitle[s] a capital defendant, on request, to intracase review by this court to determine whether the death penalty is grossly disproportionate to his personal culpability." *People v. Anderson, supra,* 25 Cal.4th at p. 602. Alternatively, the Court should conduct intracase proportionality review, and either reverse, or modify the judgment to strike the penalty of death, on the same constitutional grounds.

Maurice Steskal suffered from a severe mental illness at the time of the killing that substantially impaired his ability to appreciate the wrongfulness of his conduct, to exercise rational judgment in relation to his conduct, and to volitionally control his conduct. The evidence is uncontroverted. Despite extensive testimony at trial, the prosecution never presented any evidence tending to show that Maurice Steskal was not in the grip of a psychosis when he shot the victim 30 times.

The trial court's statements to the contrary in its decision denying the automatic motion to modify the verdict do not compel a contrary conclusion. This Court independently reviews the trial court's ruling after

"independently considering the record." *People v. Memro* (1995) 11 Cal.4th 786, 884.

The trial court's comments are unsupported by the record. The trial court stated:

> "Evidence of the defendant's minimal mental defect was not sufficient to establish either a defense or constitute a mitigating factor sufficient to outweigh the callousness of the circumstances of the crime. The defendant was not under the influence of drugs or alcohol. His mental disorder explains but not does excuse his behavior.
>
> "The defendant did not have such a mental defect to such a degree that, at the time the offense was committed, he didn't appreciate the criminality of his conduct or wasn't able to conform his conduct to the requirements of the law."

(37 RT 7123.) (The trial court's comments broadly relate to two of the three categories for which the ABA Report would exclude persons from capital punishment.[90] As to the third category, the trial court made no comment as to whether Maurice Steskal was significantly impaired with respect to "the ability to to exercise rational judgment in relation to conduct," despite his mental illness.)

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[90] But the trial court's comments do not address whether Mr. Steskal was "significantly impaired" with respect to the two categories, so the court's findings do not track the first two categories of the ABA Report. As noted above, the ABA Report would exclude from the death penalty defendants who suffered from severe mental illness that

> significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.

Am. Bar Ass'n, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Phys. Disability L. Rep. at p. 668.

But there is *no* evidence supporting the prosecution position that Maurice Steskal was not mentally ill, or the trial court's statement that he had a mere "minimal mental defect" that did not affect his culpability for the offense, or any assertion that he had the ability to exercise rational judgment in relation to his conduct. The prosecution presented no evidence as to Maurice Steskal's mental state to controvert the testimony of the defense experts, no evidence that Maurice Steskal was not psychotic, and in particular no evidence to controvert the expert opinion of forensic psychiatrist Dr. Roderick Pettis that on the night of the killing, Maurice Steskal was "grossly decompensated" (30 RT 5758), meaning "his psychosis has reached an extreme level. . . . He can't control himself. He can't control his behavior." (30 RT 5759.)

All the evidence at trial overwhelmingly supports the conclusion Maurice Steskal suffered from severe mental illness from childhood on, and that severe mental illness left him with a psychotically distorted sense of reality in which he was unable to appreciate the criminality of his conduct, and was unable to control himself so as to conform his conduct to the law, and was severely impaired in his ability to exercise rational judgment in relation to his conduct.[91]

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[91] In *People v. Jennings* (2010) 50 Cal.4th 616, 686, this Court stated:

> To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.]

Because the Eighth Amendment and the cruel or unusual punishments clause of the California Constitution, and the equal protection clauses of both constitutions, bar the execution of the severely mentally ill, and because in this case, even apart from such categorical analysis, the sentence of death is grossly disproportionate to Maurice Steskal's culpability, the Court should reverse the judgment of death, or modify the judgment to strike the death sentence and provide for a sentence of life without parole.

In this case, the circumstances of the offense are that appellant, who was the only person involved in killing Deputy Riches, was motivated by an extreme psychotic delusion that law enforcement officers were trying to kill him and Deputy Riches posed an imminent danger. Consideration of the manner of the killing reinforces that it was directed solely at a law enforcement officer, a plain consequence of Maurice Steskal's psychosis. No other person was targeted or harmed. At the time, Maurice Steskal was a 39-year old adult, with no prior history of conviction for any crimes of violence, despite his near-lifelong severe mental illness. Under these circumstances, and in light of the constitutional considerations discussed above, the Court should conclude that the death penalty is grossly disproportionate to Maurice Steskal's individual, substantially-reduced culpability.

VII. THE TRIAL COURT REVERSIBLY ERRED BY ALLOWING THE PROSECUTOR TO ELICIT IRRELEVANT AND INFLAMMATORY FACTS ABOUT TWO OTHER DEATH PENALTY CASES IN WHICH DEFENSE FORENSIC PSYCHIATRIST DR. RODERICK PETTIS HAD TESTIFIED, IN VIOLATION OF MR. STESKAL'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

A. Introduction.

Mr. Steskal's mental illness was the central theme of his penalty phase defense, and the most critical witness in support of that defense was Dr. Roderick Pettis, a forensic psychiatrist. On cross-examination, over defense objection, the trial court allowed the prosecutor to question Dr. Pettis regarding the facts of two other death penalty cases in which Dr. Pettis had testified.

The evidence the trial court allowed the prosecutor to put before the jury – including that Dr. Pettis had served as an expert witness in the case of death penalty defendant Horace Kelly, who had raped and murdered two women, and in the case of death penalty defendant James Robert Scott, who had raped a woman and then set her on fire – had no tendency to prove any fact bearing on any disputed issue at trial, and was so inflammatory as to deny Mr. Steskal a fair penalty trial.

B. The Trial Court Allowed the Prosecutor to Question Dr. Pettis About the Facts of Two Unrelated Death Penalty Cases.

On cross-examination, the prosecutor asked Dr. Pettis about the death penalty habeas corpus cases in which he had testified:

Q. And what cases were those, the habeas corpus cases?
A. (NO AUDIBLE RESPONSE).
Q. Let me help you.
A. Yeah, you might.
Q. Horace Kelly?
A. Horace Kelly.
Q. And Mr. Scott?
A. That's right.

(30 RT 5795-5796.)

The prosecutor next elicited that Dr. Pettis had never been asked to testify for the prosecution, and then returned to the habeas corpus cases in which Dr. Pettis had been involved. (30 RT 5796.)

Q. With respect to Horace Kelly, that was a San Bernardino case, wasn't it?
A. That's my recollection. My involvement in that had nothing to do with the case itself, but had to do with his competency at the time for execution.
Q. Right.
A. But as I recall, it was from San Bernardino, yeah.
Q. And in that case he had --
MS. SPEISER: I am going to object, relevancy of this line of questioning.
THE COURT: Overruled.
Q. BY MR. BROWN: Mr. Kelly had raped and murdered two women, among others; isn't that correct?
A. That --
MS. SPEISER: Objection, relevance.
THE COURT: Overruled.
THE WITNESS: You know, I can't tell you that I remember exactly what he did. Again, my involvement was not at the trial level, it was about whether he was competent at the time that he was going to be executed, so I was not involved at the trial level or at the, you know, the habeas level on a mitigation basis.
Q. BY MR. BROWN: And so on that case you were testifying that Mr. Kelly didn't know what was going on, and didn't know he was -- why he was being executed?

A. That's right.
Q. Is that right?
A. That's right.

(30 RT 5797-5798 (emphasis added).)

The prosecutor then questioned Dr. Pettis as to whether he had a bias against the death penalty. Dr. Pettis testified he did not. (30 RT 5798.) The prosecutor next asked Dr. Pettis:

Q. What was the Scott case?
MS. SPEISER: Objection, relevance.
THE COURT: Overruled.
THE WITNESS: It was another habeas case where, and, again, when you are doing habeas cases, you are looking at, it is an appeal, so what the lawyers will come to me to ask and say at the trial level, did the lawyers miss any mental health issues that might have been relevant, usually only to the penalty phase of the trial. So the law requires that if there are things in mitigation when you are considering death, the jury is entitled to the information. So one of the things the lawyers are doing is say was there effective representation of that client, and so they will hire a psychiatrist to look at the records. And I will get just volumes and volumes of records to see were there some mental health issues that might have been looked into that might have made a difference, and that's what my job is on those kind of cases.
Q. BY MR. BROWN: What was the essence of your testimony on the Scott case?
MS. SPEISER: Objection, relevance.
THE COURT: Overruled.
THE WITNESS: If you want to help me out, I will be happy to take a look at it.
Q. BY MR. BROWN: I can help you out a little bit. Let me show you the official --
A. Sure.
Q. -- case report on James Robert Scott. And let me have you read, you can just read this to yourself if you want to.
A. Okay, sure.
Q. Let me get this clip out of the way.

A. All right.
Q. (INDICATING). Is your first name Roderick?
A. Roderick, yes.
Q. So I guess this is talking about you, isn't it?
A. Right.
Q. (INDICATING).
A. (WITNESS COMPLIES).
Yes, okay.
Q. Okay. And the facts on the Scott case –

MS. SPEISER: Excuse me, can I ask counsel to show me what he showed the witness.

THE COURT: I am sorry?

MS. SPEISER: Can I ask counsel to show me what he showed the witness, please, unless he has a copy for me to look at.

THE COURT: You may approach.

MR. BROWN: SURE (INDICATING).

Q. BY MR. BROWN: What was the essence in the Scott case, it was Mr. Scott raped a woman?

A. Yes.

Q. And then lit her on fire, didn't he?

A. That's my recollection, from having read that, yes.

Q. And what was the essence of your testimony with respect to Mr. Scott after a jury had put him up on Death Row?

A. That he was suffering at the time from a mental illness.

Q. *Okay. And that he didn't know that he had raped the lady; is that what it was?*

A. You know, I'd have to read that to see whether specifically I said that or not. But, you know, at the time he was suffering from a mental illness.

Q. Right here (INDICATING).

A. Can you show me where you are?

Q. Right where we were before, I thought it said it in here didn't it:

> *"Dr. Pettis' diagnosis was that on the night of the murder, petitioner was in a disorganized and dissociative state, and that events on his mind were not going in a normal linear fashion, but rather things are popping up and down and going out of order."*

A. Now, I must say that is a very loose paraphrase of my testimony, but that he was in a disorganized dissociative state yes, but popping up and out of order is not.
Q. Did I read it correctly though?
A. You did read it correctly, yes.
Q. Good, that means I am not dissociating right now.
A. No, you are not.

(30 RT 5799-5801 (emphasis added).) In his remaining cross-examination of Dr. Pettis, the prosecutor did not bring up the Kelly or Scott cases again.

Thereafter, outside the presence of the jurors, Mr. Steskal's counsel renewed the objections to the prosecutor's line of questioning to Dr. Pettis regarding the Kelly and Scott cases, arguing they were irrelevant and unfairly undermined Dr. Pettis's expert testimony. (31 RT 5814-5819.)[92] Counsel expressly invoked federal constitutional grounds for the objection,

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[92] Appellant's counsel specifically argued:

> The different evidence, the different circumstances of those cases, [Dr. Pettis's] involvement, the facts of them are irrelevant on the question of his credibility in this matter, in the matter of Maurice Steskal. It is improper to bring in these other cases up unless they are relevant to impeach this witness about something he is testifying about in our case.
>
> And the line of questioning didn't have any tendency and reason to disprove or prove the truthfulness of his testimony in our case. The only purpose I can see having been served is to highlight these ugly cases, other ugly cases connected to the witness in an effort to somehow dirty him up, his credibility in this case with this collateral and immaterial information.
>
> Those cases have nothing to do with any opinion he has proffered in this case based on anything we heard in cross-examination yesterday.

(31 RT 5815.)

including due process and the Sixth, Eighth and Fourteenth Amendments. (31 RT 5815-5816.)

The trial court overruled the objections. (31 RT 5821.)

C. Because the Facts of the Kelly and Scott Cases Were Irrelevant and Inflammatory, The Trial Court's Rulings Were Erroneous and Violated Mr. Steskal's Federal Constitutional Rights.

The prosecutor argued that the Horace Kelly and James Robert Scott cases were "relevant to this witness' bias with respect to death penalty cases." (31 RT 5820.)

It is, of course, permissible to impeach a witness for bias. Evidence Code section 780 provides, in pertinent part, that a jury "may consider in determining the credibility of a witness "any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including . . . [¶¶ . . . . (f) The existence or nonexistence of a bias, interest, or other motive." And this Court has long made clear that "[t]he Evidence Code leaves the question of the admissibility of evidence offered for the purpose of showing bias to the sound discretion of the trial judge." *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 591.

The trial court's discretion, however, is circumscribed. The *Grudt* court explained:

> "'[The] proper scope for the exercise of discretion by the trial court is in limiting cross-examination to a disclosure of such facts only as may show the existence of hostility, and rejecting any matters which might be pertinent only to a justification of hostility on the part of the witness, for it is the existence of the feeling which is material, and not the right or wrong in the transaction which occasions it.'" (*Eye* v. *Kafer, Inc.* (1962) 202 Cal.App.2d 449, 456, quoting 74

> A.L.R. 1154, 1157; *Estate of Martin* (1915) 170 Cal. 657, 671.) "'[The] inquiry for impeachment is usually confined to the *prominent* motives for untruthful testimony: *interest* in the suit which *necessarily* tends to bias, and *other circumstances* showing bias which are not too remote.'" (*People* v. *Vanderburg* (1960) 184 Cal.App.2d 33, 41, quoting Witkin, Cal. Evidence (1958) p. 688.)

Grudt v. City of Los Angeles, *supra*, 2 Cal.3d at pp. 591-592 (orig. emphasis). In *Grudt*, the Court held the trial court had reversibly erred when it allowed defendants to use the arrest records of one of plaintiff's witnesses and of the family of another of plaintiff's witnesses for the professed purpose of impeachment by showing the witnesses' bias against the police, where no felony convictions were shown, because "the thread of inferences from past arrests by the police, to hostility against police in general, to a willingness to distort testimony in a civil action involving individual police officers unknown to the witness is so tenuous as to render invalid the professed purpose of the defense counsel in offering the evidence." *Id.* at p. 592.

In this case, the "thread of inferences" is not merely tenuous – it is nonexistent. There is no rational chain of inferences between the fact that Horace Kelly had raped and murdered several women, or the fact that James Robert Scott had raped a woman and then set her on fire, and any supposed bias against the death penalty on the part of Dr. Pettis.

Evidence Code section 780 allows credibility evidence "that has any tendency in reason to prove or disprove the truthfulness of [the witness's] testimony." See *People v. Bennett* (2009) 45 Cal.4th 577, 604. Whether or not Horace Kelly committed multiple rapes and murders, or James Robert Scott raped and set fire to a woman, has no tendency in reason to show that Dr. Roderick Pettis harbored a bias against the death penalty.

This Court has indicated that it is proper to question an expert about his or her testimony in "prior cases involving similar issues." *People v. Price* (1991) 1 Cal.4th 324, 456. But the prosecutor made no effort to demonstrate that either the Kelly or Scott cases involved issues similar to those in Mr. Steskal's case, or that they had any similarity at all, other than the broad similarity of death penalty cases that involved issues of mental illness.

And the facts the prosecutor brought out during the supposed impeachment of Dr. Pettis for bias show the issues were not similar.

In the Horace Kelly case, Dr. Pettis testified that his role had been limited to providing an opinion on whether or not Mr. Kelly was competent to be executed. (30 RT 5797-5798.) Dr. Pettis provided no information regarding Kelly's mental state at the time of his crimes.

By contrast, Mr. Steskal's trial presented no such issue of competency, and Dr. Pettis expressed no view on Mr. Steskal's competence to be executed. His testimony was focused on Mr. Steskal's mental state at the time of the crime.

As to the James Robert Scott case, the prosecutor elicited from Dr. Pettis that the essence of his testimony was that, on the night of the murder, Mr. Scott "was in a disorganized dissociative state." (30 RT 5801.)

By contrast, Dr. Pettis never testified that Mr. Steskal was in a disorganized or dissociative state when he committed his offense. Instead, in his testimony on direct examination, Dr. Pettis made the point that Mr. Steskal was not disorganized or schizophrenic, and that his behavior was nonetheless entirely consistent with his psychotic delusions. (30 RT 5764.) The specifics of the Scott case compared to this case make quite clear the cases did not raise similar issues.

Thus, the trial court improperly overruled Mr. Steskal's objections to the prosecution's questioning of Dr. Pettis regarding the Kelly and Scott cases. The supposed impeachment evidence was irrelevant, and admitted in violation of Evidence Code sections 350, making only relevant evidence admissible, and 780, subdivision (f), allowing impeachment with evidence that has "any tendency in reason" to demonstrate the untruthfulness of a witness's testimony.[93]

Additionally, though the trial court stated it had considered whether or not the evidence was more prejudicial than probative (31 RT 5821), the trial court abused its discretion under Evidence Code section 352. Under that section, of course, the court must determine whether the "probative value" of the evidence sought to be admitted is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The trial court -- while finding that "*the 352 weighing process leans more towards prejudicial from probative*" (31 RT 5821, emphasis added) -- nevertheless refused to sustain the defense objections.

The trial court's insight was correct, though its ruling was not. The details of the Kelly and Scott cases had no "substantial probative value" on any "disputed material issue." See *People v. Kipp, supra,* 26 Cal.4th at p. 1121. Because the evidence in question had no probative value whatsoever on any disputed material issue, there was nothing for the trial court to properly weigh on the "probativity" side of the balance. Thus, the trial

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[93] Under Evidence Code section 210, "'[r]elevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

court, in ruling the professed impeachment to be proper, necessarily abused its discretion under Evidence Code section 352.

The introduction of the facts of the Horace Kelly and James Robert Scott cases by the prosecutor, though legally irrelevant, was not without a purpose.

The prosecutor introduced those irrelevant facts in order to achieve a desired result – to prejudice the jury against Dr. Pettis and Mr. Steskal, by associating them with the multiple rape-murders committed by Horace Kelly, and the rape and murder committed by James Robert Scott. This was inherently inflammatory, and violated Mr. Steskal's federal constitutional right to due process of law. Federal courts find due process violated when the prosecution introduces evidence that has no legitimate probative value from which inferences can be drawn, and the evidence is of an "inflammatory quality" so as to prejudice the right to a fair trial. E.g., *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *McKinney v. Rees, supra,* 993 F.2d at pp. 1385, 1386. "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee* (1991) 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720.

In this case, Mr. Steskal's penalty phase defense centered on his mental illness as the critical mitigating factor. Though other mental health experts testified, the testimony of Dr. Pettis was, in turn, central to the mental health focus of the defense. No other mental health professional testified directly regarding Mr. Steskal's mental state on the night of the crime. Dr. Pettis's testimony – that on the night of the offense, Maurice Steskal was suffering from psychotic delusions of persecution, had "grossly

decompensated," and was not in control of his actions (30 RT 5758-5759, 5668-5669, 5803) – spoke directly to Mr. Steskal's most powerful mitigating factor.

But the evidence the prosecutor used to impeach Dr. Pettis rendered the penalty phase trial fundamentally unfair because it invited the jurors to disregard Dr. Pettis's carefully drawn conclusions, not because he was unqualified or untruthful, but because he was the kind of doctor who would even help Death Row inmates who had committed multiple rapes, as in the Kelly case, or a particularly horrific rape-murder, as in the Scott case.

The obvious and illegitimate inference of bias the prosecutor intended the jury to draw was that, if Dr. Pettis was the sort of psychiatrist who would testify on behalf of killers such as Kelly and Scott, then he must be against the death penalty; if he is against the death penalty, his testimony is biased, and not reliable.

For the same reasons, the evidence regarding the Kelly and Scott cases elicited by the prosecutor also violated appellant's right to a reliable capital-sentencing determination. See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (requiring heightened reliability for capital-sentencing determination).

D. Mr. Steskal Was Prejudiced.

When an error or a combination of errors occurs at the penalty phase of a capital case, this Court will reverse the judgment if there is a "reasonable possibility" that the jurors would have reached a different result if the error or errors had not occurred. *People v. Brown* (1988) 46 Cal.3d 432, 448. This Court has stated that the *Brown* prejudice standard is the same in substance and effect as the general standard for federal

constitutional errors of the trial type, set forth in *Chapman v. California, supra,* 386 U.S. 18, 23-24; see *People v. Ashmus* (1991) 54 Cal.3d 932, 965.

Under *Chapman*, it is not the defendant's burden to show the error caused harm. On the contrary, it is the prosecution's heavy burden to demonstrate the *absence* of any harmful effect flowing from the error. The prosecution must "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." *Chapman v. California, supra*, 386 U.S. at p. 24. The focus of *Chapman* review is on "what the jury actually decided and whether the error might have tainted its decision." *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182.

The prosecution will be unable to make its proof here. Numerous factors indicate a high likelihood of prejudice.

First, the relationship of the error to the critical issues and witnesses in a case is a significant factor in assessing prejudice. Dr. Pettis's testimony was nothing less than central to Mr. Steskal's penalty phase defense. He extensively interviewed Mr. Steskal, and his testimony that Mr. Steskal was suffering from a psychotic illness on the day he shot the victim was critical. Yet, as discussed above, the effect of allowing the prosecutor to cross-examine Dr. Pettis regarding details of other death penalty cases in which he had been involved was, as the prosecutor clearly intended, to smear Dr. Pettis as the kind of doctor who would testify even for rapist-murderers, and thus must be biased. (See 31 RT 5815.) This could only have been prejudicial.

Second, this was a close case on the question of penalty. This is indicated by the length of the jury's deliberations. Here, jury deliberations begin on Monday December 8, 2003 (36 RT 6929, 7038; 10 CT 2604), but

the jury did not reach its penalty phase verdict until five days later, on Friday, December 12, 2003. (37 RT 7073; 11 CT 2848.) Lengthy deliberation is a strong signal that the jury was struggling with the issues and considered the case a close one. *In re Martin* (1987) 44 Cal.3d 1, 51; *United States v. Velarde–Gomez* (9th Cir. 2001) 269 F.3d 1023, 1036 (en banc); *United States v. Varoudakis* (1st Cir. 2000) 233 F.3d 113, 126.

Third, that a prior proceeding without the error had a more favorable result is another factor strongly suggesting prejudice. See, e.g., *Krulewitch v. U.S.* (1949) 336 U.S. 440, 445, 69 S.Ct. 716, 93 L.Ed. 790; *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, 1056 fn. 18. In this case, the first jury was unable to reach a penalty phase verdict, but reached an impasse on a vote of eleven to one in favor of life imprisonment. (14 RT 2743-2744.) There can be no reasonable assurance that, without the improper impeachment of the critical witness regarding Mr. Steskal's severe mental illness with the inflammatory facts of other death penalty cases in which he had testified, the result of this second penalty phase trial would have been the same.

Accordingly, the penalty phase judgment should be reversed.

VIII. BECAUSE THE PROSECUTOR COMMITTED SERIOUS MISCONDUCT IN PENALTY PHASE ARGUMENT TO THE JURY, THE JUDGMENT OF DEATH MUST BE REVERSED.

A. Introduction.

This was not a strong case as to penalty. The first penalty phase jury had reached an impasse at a count of eleven-to-one in favor of a life imprisonment verdict. (14 RT 2743-2744.)

Apparently to ensure a more favorable result the second time around, in his penalty phase closing argument, the penalty phase re-trial prosecutor, who was not involved in the guilt phase trial or the first penalty phase trial,[94] committed several acts of misconduct designed to improperly influence the jurors. The prosecutor improperly argued that the jury should consider evidence of Mr. Steskal's mental illness as presented by a defense expert psychiatrist, Dr. Roderick Pettis, in assessing Mr. Steskal's alleged future dangerousness. And the prosecutor impermissibly argued to the jury that there was a "cover-up" agreement between Mr. Steskal and his wife, even though there was no evidence of such an agreement.

This misconduct prejudiced Mr. Steskal, and requires reversal of the death judgment.

B. Legal Standards.

The penalty phase closing argument by the prosecutor violated both constitutional and non-constitutional state law standards. As noted previously in connection with the guilt phase, prosecutorial misconduct rises to the level of a federal due process violation when the misconduct is so egregious it renders the trial fundamentally unfair. *Donnelly v.*

[94] The prosecutor who had tried the guilt phase and first penalty phase was replaced for the re-trial by a prosecutor new to the case.

DeChristoforo, supra, 416 U.S. 637, 642; *Darden v. Wainwright, supra,* 477 U.S. 168, 181.

As to non-constitutional prosecutorial misconduct, this Court stated in *People v. Ochoa* (1998) 19 Cal.4th 353, 427:

> Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)"

C. The Prosecutor Committed Egregious Misconduct by Arguing that Maurice Steskal's Mental Health Mitigation Evidence Was Actually Aggravating.

In his closing argument to the jury, the prosecutor spoke of a digging tool, Exhibit 80(d), that appellant had assertedly fashioned while in jail awaiting the penalty phase re-trial:

> What he is trying to do is he is trying to escape from the -- one of the highest tech jails in California. Brand-new, relatively new jail. Five years old, or something like that. Or, maybe a little older than that.
>
> 80(d), Delta. Correctional officer Le Geyt, remember his experience? We got lucky there with his experience in Los Angeles county. This is known as a shank. To the side of the neck anywhere, or as a stabbing instrument, absolutely deadly weapon.
>
> *Do you think for a moment that the defendant wouldn't use that? Look back at Dr. Pettis' testimony with respect to the defendant's encapsulated delusion.* He said the defendant is very mild and meek, that kind of thing, except *when he is into this delusion thing,*

and then he just goes all out of control is what Pettis says.

So if you tend to believe this, *if you think the evidence supports Pettis, you have a person right now that is capable and willing to kill someone in authority.*

(36 RT 6830-6831 (emphasis added).)

After this egregious argument, the prosecutor returned to this same theme – that Dr. Pettis's testimony supported the prosecution's case, not the defense -- later in his closing remarks to the jurors, reinforcing it by reading from a portion of his cross-examination of Dr. Pettis in which he quoted from a copy of Dr. Pettis's report:

"QUESTION: It says, quote, outside of this delusional sphere Maurice can appear to be no more than eccentric and quiet. *It is not until he interacts with authority figures, which plays a large role in his delusional system, that he becomes irrational and unreasonable* in a way that characterizes a psychotic disorder. "

(36 RT 6848 (emphasis added).) The prosecutor went on to argue:

That says a lot.

So it looks to me like the evidence shows at this point that there is significant evidence that might indicate to you that there is no psychiatric or psychological disorder in this defendant. When you look at all of the ways these doctors collected their information, and you look at everything, including Huntington Beach and all of that.

Some of you, however, may feel that there may be some psychiatric issues here. If you have, *if Dr. Pettis has some credibility with you, you may want to look at this part of his testimony where he is saying that the defendant, outside of the delusional sphere can appear no more than eccentric and quiet. But, when he gets confronted with authority figures, you see what happens.*

That would be less than mitigating if that is, in fact, true, I would suggest to you.

(36 RT 6848-6849 (emphasis added).)

The prosecutor's use of Dr. Pettis's testimony regarding Mr. Steskal's mental illness as support for his argument for the penalty of death transgressed established boundaries and comprised prosecutorial misconduct under settled law.

The testimony of Dr. Pettis was relevant to two of the listed factors under Penal Code section 190.3, factor (d) ("[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance") and factor (h) ("[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect . . . .").

This Court has long held that a majority of the eleven statutory factors "can only be mitigating." *People v. Wader* (1993) 5 Cal.4th 610, 657. Among the factors that can "only be mitigating" are the factors implicated here, (d) and (h). *Id.* See, e.g., *People v. Whitt* (1990) 51 Cal.3d 620, 654 (section 190.3, factors (d), (e), (f), (h) and (k).)

In closing argument at the penalty phase, the prosecutor is not foreclosed from arguing that the evidence offered in mitigation is not mitigating at all, or should not be given significant weight by the jurors. See *People v. Weaver* (2012) 53 Cal.4th 1056, 1087 (trial court in capital bench trial may consider that mitigation evidence is "not particularly mitigating"). But this Court has also recognized the scope of permissible prosecutorial closing argument at the penalty phase:

> The prosecutor was permitted to argue in closing argument any reasonable inference, from the evidence admitted, that was *relevant to any of the statutory factors in aggravation.* (See *People v. Lucas* (1995) 12 Cal.4th 415, 496.)

People v. Avena (1996) 13 Cal.4th 394, 439-40 (emphasis added).

Thus, a prosecutor is not permitted to argue that evidence introduced in support of mitigation, under factors that are exclusively mitigating, is actually aggravating.

But that is exactly what the prosecutor did in this case when he argued, among other things,

> if you think *the evidence supports Pettis, you have a person right now that is capable and willing to kill someone in authority.*

(36 RT 6831 (emphasis added).) This argument was improper, and comprised misconduct. It was deceptive, and reprehensible. The prosecutor knew that he could not argue that mitigation evidence was aggravating – indeed, his comments reflect this (36 RT 6935) – but he made such an argument anyway (36 RT 6831), and then denied he had done so. (36 RT 6936.)

Appellant made a motion for a mistrial based on this misconduct, and the trial court denied the mistrial motion. (36 RT 6936.) This was sufficient to preserve the issue. In any event, the issue was not waived. Generally, a defendant may not complain of misconduct on appeal unless at trial the defendant made an adequate and timely objection, and requested the court admonish the jurors. That, however,

> is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "an admonition would not have cured the harm caused by the

> misconduct." [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." [Citations.]

People v. Hill, supra, 17 Cal.4th at p. 820.

The record demonstrates that a timely objection and request for admonition would certainly have been futile. The following day, after the completion of the prosecutor's closing argument, the defense moved for a mistrial based on the prosecution's misconduct in arguing that Dr. Pettis's testimony in mitigation was actually aggravating, as noted above. (36 RT 6929-6935.) The defense specifically cited case-law from this Court indicating that a mitigating factor cannot be used as an aggravator. *Id.*, citing *People v. Edelbacher* (1989) 47 Cal.3d 983, 1032-1033.

After the prosecutor briefly responded to the defense mistrial motion, denying that he had argued that a mitigating factor was aggravating, the trial court denied the mistrial motion. (36 RT 6936.) As this Court has made plain:

> The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice. [Citation.]

People v. Williams (1997) 16 Cal.4th 153, 254. Even assuming the mistrial motion itself somehow failed to preserve the issue, the trial court's swift denial of the mistrial motion shows that any earlier objection and request for admonition would have been equally futile.

There is more than a reasonable likelihood that the jury construed the prosecutor's argument as permission to do exactly what he urged them to do – to conclude, if the evidence supported the views of defense expert

Dr. Pettis, that appellant was, and remained, willing to kill someone in a position of authority.

D. The Prosecutor Improperly Argued Facts Not In Evidence Regarding a Supposed Cover-Up Agreement Between Appellant and His Wife.

The prosecutor committed further misconduct in his penalty phase closing argument by referring to facts not in evidence. As this Court has explained, this practice

> is "clearly ... misconduct" (*People v. Pinholster* (1992) 1 Cal.4th 865, 948), because such statements "tend[] to make the prosecutor his own witness-offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (*Bolton*, *supra*, 23 Cal.3d at p. 213; *People v. Benson*, *supra*, 52 Cal.3d at p. 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal.3d 57, 108; *People v. Kirkes* (1952) 39 Cal.2d 719, 724.) "Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal." (5 Witkin & Epstein, *supra*, Trial, section 2901, p. 3550.)

People v. Hill, supra, 17 Cal.4th at pp. 827-28.

Here, the prosecutor violated this principle by arguing that there was a cover-up agreement between appellant and his wife, pursuant to which Nannette Steskal lied to police. Specifically, the prosecutor argued:

> Other things that the doctors did base their opinion upon would be interviews of the defendant's wife. Are you comfortable relying on the doctors' testimony when they rely on interviews such as the defendant's wife gave?
>
> You recall those. June 12th, 1999, with the

sheriff's office that was tape-recorded. Replete with lies *that she and the defendant had worked out earlier* that day after he killed Brad Riches.

The second interview of Mrs. Steskal, June 15th, three days later. Replete with lies. *Once again, working on that agreement that she had with her husband to try to cover this up.*

MR. DAVIS: I object. That assumes a fact not in evidence.

THE COURT: Overruled.

(36 RT 6793 (emphasis added).)

The trial court's ruling erroneously permitted this improper argument. There was no evidence that there was actually a "cover-up" agreement under which Nannette Steskal lied to police at her husband's request. Neither appellant nor Nannette Steskal testified at any stage of the trial. Nannette Steskal gave a statement to investigators – but that statement was not introduced into evidence.

Nannette Steskal's statement was, however, provided to defense experts, and formed the basis for questioning of Dr. Pettis at trial. On cross-examination, Dr. Pettis admitted that it was "conceivable" that appellant and his wife "entered into an agreement . . . to lie to police". 33 RT 6242.

But that an agreement is "conceivable" does not mean that an agreement has, in fact, been made.

Indeed, in ruling on an objection to the prosecutor's questioning of Dr. Pettis, the trial judge implicitly recognized as much:

Q. And did you form the opinion after reading that interview that Mrs. Steskal did, in fact, lie to the police?

A. Yes.

Q. And it would be fair to say she lied to the

police, in part at least because of what the defendant had told her to say and not to say to the police?

MR. DAVIS: Well, I am going to object. It calls for speculation on the part of this witness as to why she did what she did.

THE COURT: Sustained.

(31 RT 5863.) The defense objection was properly sustained because there is no evidence as to why Mrs. Steskal said what she said to investigators. Just as Dr. Pettis's answer would have been speculation, so too was the prosecutor's argument based on speculation – and not based on facts in evidence.

A prosecutor's misconduct in misrepresenting the evidence, and arguing facts not in evidence, is inherently deceptive. The argument asks the jury to base a result on evidence when, in reality, there is no evidence. It is also reasonably likely the jury interpreted the prosecutor's misconduct in an objectionable way. Notably, the trial court overruled the defense objection to the prosecutor's assertion of facts not in evidence, clearly signaling to the jurors that, in the court's view, there was no impropriety in the prosecutor's reference. (36 RT 6793.) The natural response of a juror, faced with the obligation to consider the quite massive amount of evidence that was presented, and in light of the fact that Mrs. Steskal's statements to investigators had, in fact, been discussed at trial, would be to assume, based on the trial court's overruling of the objection that, even if the juror might not remember such evidence, the prosecutor correctly referred to evidence of an agreement between appellant and his wife.

E. The Prosecutor's Misconduct Violated Mr. Steskal's Right to a Fair Penalty Phase Trial Under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Prosecutorial misconduct rises to the level of a due process violation when the misconduct is so egregious it renders the trial fundamentally unfair. *Donnelly v. DeChristoforo, supra,* 416 U.S. 637, 643; *Darden v. Wainwright, supra,* 477 U.S. 168, 181.

In evaluating whether prosecutorial misconduct rises to the level of a constitutional violation of due process, the Supreme Court in *Donnelly* looked to several factors: whether the misconduct infringes upon a right specifically protected by the Bill of Rights; whether the trial court gave a curative instruction; and whether the comments were isolated. *Donnelly, supra,* 416 U.S. at pp. 645-48. In addition, the Court has also considered whether the prosecutor manipulated or misstated the evidence; whether the defense attorney invited the comments; the intent of the prosecutor; whether defense counsel objected to the conduct; and, the weight of the evidence against the defendant. *Darden, supra,* 477 U.S. at pp. 181-183. The Court has not held that particular factors are exclusive or even controlling. Instead the Court held that the analysis should be guided by the particular circumstances of a case. See, e.g., *Darden, supra,* 477 U.S. at pp. 181-183. Thus, "the process of constitutional line drawing in this regard is necessarily imprecise." *Donnelly, supra,* 416 U.S. at p. 645.

In this case, the factors considered by the Court militate in favor of a conclusion that Mr. Steskal's second penalty phase trial was rendered fundamentally unfair by the prosecutor's intentional misconduct.

First, the misconduct here infringes on a right protected by the Eighth Amendment. Because death is indeed different, the Eighth

Amendment demands a heightened degree of "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina, supra,* 428 U.S. 280, 305. The prosecutor's misconduct specifically infringed on Mr. Steskal's right to a fair penalty phase trial under the Eighth Amendment.

Second, there was, as the previous discussion showed, no curative instruction given by the court as to either the prosecutor's impermissible argument that the jurors should consider Dr. Pettis's testimony in support of the case in aggravation, or to the prosecutor's improper reference to the supposed cover-up agreement between Mr. Steskal and his wife, which was not supported by any evidence.

Third, both the instances of prosecutorial misconduct involve the misstatement or manipulation of the evidence, as shown above.

Fourth, defense counsel did not invite either instance of misconduct.

Fifth, defense counsel objected to the misconduct.

Finally, the weight of the evidence against Mr. Steskal was not great, especially in view of Mr. Steskal's strong showing of mitigation, as reflected in the result of the first penalty phase trial.

Accordingly, the Court should conclude that prosecutorial misconduct rendered the penalty phase trial unreliable and fundamentally unfair, and violative of the Fifth, Sixth, Eighth and Fourteenth Amendments.

F. The Trial Court Abused Its Discretion and Violated Mr. Steskal's Constitutional Rights by Failing to Grant a Mistrial.

As to the prosecutor's misconduct in questioning Dr. Pettis, there is an alternative basis for finding error here. As shown above, after the

prosecutor argued to the jury that Dr. Pettis's testimony regarding Mr. Steskal's mental illness could be used by the jury as a basis for finding aggravation, the defense moved for a mistrial, which the trial court denied. (36 RT 6936.) The trial court abused its discretion, and violated California law and the Fifth, Sixth, Eighth and Fourteenth Amendments, in refusing to grant the defense motion for a mistrial.

The legal standard is clear. This Court reviews the trial court's ruling under state law for an abuse of discretion. "A trial court should grant a mistrial only if the defendant will suffer prejudice that is " ' "incurable by admonition or instruction." ' " *People v. Davis* (2005) 36 Cal.4th 510, 553-554.

Here, the prejudice suffered by Mr. Steskal was incurable. The prosecutor's argument -- "if you think the evidence supports [defense expert Dr.] Pettis, you have a person right now that is capable and willing to kill someone in authority" (36 RT 6831) -- is plainly so egregious, and such a perversion of the purpose of mitigation evidence, that no juror could reasonably be expected to forget it, or ignore it, even in the face of an admonition that was not forthcoming.

G. Mr. Steskal Suffered Prejudice.

The applicable standards of prejudice for penalty phase error – the reasonable possibility standard of *People v. Brown*, *supra*, 46 Cal.3d 432, 448, and the federal "beyond a reasonable doubt" standard of *Chapman v. California*, *supra*, 386 U.S. 18, 24 – have been discussed above. They are the same in substance and effect. Under either standard, the death judgment must be reversed.

This was not a case in which death was a foregone conclusion. As noted above, the first jury penalty phase trial was unable to reach a verdict, and a mistrial was declared after the jury deadlocked, eleven-to-one, in favor of a life imprisonment verdict. (6 CT 1445-1446; 14 RT 2743-2744.) Appellant presented a strong case in mitigation, demonstrating a horrific, victimized childhood, and struggles with the plague of a severe mental illness that was exacerbated by the outrageous actions of a malicious law enforcement officer, Deputy Spencer. In view of the compelling circumstances of Mr. Steskal's life and illness, together with the first jury's vote as to penalty, the Court should have no confidence that the prosecutor's misconduct did not contribute to the death verdict the second time around.

IX. THE TRIAL COURT PREJUDICIALLY ERRED BY ALLOWING INTO EVIDENCE A LIFE-SIZE, REMARKABLY REALISTIC, BLUE-EYED, WIGGED MANNEQUIN WITH FULL FACIAL FEATURES, DRESSED IN DEPUTY BRAD RICHES' ACTUAL TORN, BLOOD- AND VOMIT-STAINED ORANGE COUNTY SHERIFFS' UNIFORM.

A. Introduction.

In the first trial, the prosecution presented the testimony of Dr. Fukumoto, a pathologist, as to the cause of Deputy Riches' death. The prosecution also presented considerable additional evidence, including 7-Eleven store surveillance videotape of the actual shooting, and the testimony of several witnesses, including the 7-Eleven store clerk, a store customer, a tenant in the same strip mall, and several deputies who quickly arrived on the scene. Over defense objection, the jury was also taken for a view of the bullet-riddled patrol vehicle. Though the first jury convicted appellant of first degree murder with the special circumstance of killing an officer in the performance of his duties, the first jury did not return a death verdict, reaching an impasse at a vote of 11-to-one for life imprisonment. (14 RT 2743-2744.) Thus, at the penalty phase re-trial, the prosecution sought to introduce, in addition to all the evidence noted above, a life-sized mannequin expressly meant to "depict" Deputy Riches.

Over defense objection, the mannequin was admitted into evidence, and used by the prosecutor in his direct examination of the pathologist, and in his closing argument.

The trial court's ruling that allowed into evidence the uniformed mannequin "depicting" Deputy Riches was prejudicially erroneous. The mannequin was not relevant to any factual issue actually disputed by the

parties at the penalty phase re-trial. And the mannequin itself – dressed in Deputy Riches' actual blood- and vomit-stained uniform, including pants, shoes and belt, with full facial features, striking blue eyes and a hair piece, and a bloody shirt pierced with pink rods to indicate bullet trajectories of the 30 wounds Deputy Riches received – is remarkably life-like, appearing to be almost human.[95]

Under the circumstances, the trial court violated Evidence Code section 352 and Mr. Steskal's federal constitutional rights to due process of law and to a fair and reliable penalty phase trial by admitting this inflammatory evidence.

B. Proceedings At Trial and Admission of the Mannequin in Deputy Riches' Uniform.

There was no attempt by the prosecution to introduce a mannequin at appellant's guilt phase trial or his first penalty phase trial. But after the first jury was unable to reach a penalty phase verdict and the prosecution announced it would proceed with a penalty re-trial, the prosecution provided the defense with a demonstrative evidence list that detailed the exhibits the prosecution intended to introduce, including a mannequin the prosecution described as "depicting Deputy Riches." (9 CT 2242.) The prosecution also listed among its exhibits, "Deputy Riches[']s uniform and police officer equipment including gun, badge, bullet proof vest, etc." (9 CT 2242; see 9 CT 2248, 2251-2252; 9 CT 2345 (evidence release form).)

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[95] The mannequin remains in storage. Appellant anticipates that later in the progress of this appeal, he will make a motion to have the mannequin physically transferred to the premises of this Court, in order to facilitate review.

On September 30, 2003, the defense filed a motion in limine seeking to exclude the mannequin, "dressed in Deputy Riches' bloodied uniform." (9 CT 2370.) The motion was expressly based on Evidence Code sections 210, 350 and 352, as well as on Mr. Steskal's independent state and federal constitutional rights, including the right to due process and to a reliable penalty determination. (9 CT 2372, 2373.)

After hearing arguments by counsel (16 RT 3054-3068; 16 RT 3217-3229; 20 RT 3933-3938; 20 RT 4010-4014; 35 RT 6653-6661), the trial court denied the defense motion in limine and admitted, over defense objection, the blue-eyed mannequin (People's Exhibit 51), dressed in Deputy Riches' clothes and service belt, with his bullet-proof vest (Exhibit 60), wearing a hair-piece or wig. (10 CT 2598; 35 RT 6659, 6664.) The court ruled that these exhibits would go into the jury room if requested by the jurors. (*Id.*)

Thereafter, the prosecutor utilized the mannequin, which was brought into the courtroom, in the medical examiner's testimony (20 RT 4019-4034), and made further use of the mannequin to illustrate his closing argument. (36 RT 6837-6838.)

C. General Standards.

The general statutory and constitutional standards are familiar.

Under Evidence Code section 352, a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." As this Court has explained:

> The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. . . . The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.

People v. Karis, supra, 46 Cal.3d at p. 638.

As the Supreme Court recognized in *Payne v. Tennessee*, when "evidence is introduced that is so unduly prejudicial that it renders the [penalty] trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee, supra,* 501 U.S. at p. 825.

D. This Court's Cases Show that the Admissibility of Mannequins Depicting Law Enforcement Officers Depends on Whether the Mannequin Is Probative of Any Actually Contested Issue, and Whether it is Highly Prejudicial.

In a line of opinions in cases involving the murder of law enforcement officers stretching over more than a half-century, this Court has upheld the admission of mannequins against defense claims of statutory and constitutional error.

This case is different. This Court should reach a different result, because of two distinguishing features: first, in this case, unlike every other case in which the admission of a mannequin representing a law enforcement victim has been upheld by this Court against a defense challenge, the mannequin was not relevant to any actually contested issue; and second, unlike every other case upholding the admission of a

mannequin illustrating fatal wounds to an officer, the mannequin in *this* case – life-sized, startlingly life-like, and dressed in Deputy Riches' vomit- and blood-stained uniform, and admitted together with a jury view of the horrific car – was far more shocking and egregious, and likely to engender an emotional response from the jurors. The combination of these two distinguishing features renders this case unlike any case involving a mannequin that this Court has previously considered.

The first of this Court's cases involving mannequins of police officers is *People v. Robillard* (1960) 55 Cal.2d 88. There, as the Court explained:

> Defendant claimed that he had shot Officer Doran six times in rapid succession when the officer tried to draw his gun. Placement and trajectories of the bullets in the officer's body tended to belie this story. Dr. Lack, in answer to questions put to him by defendant, testified that in his opinion the wounds in the body could not have been inflicted in the manner described by defendant. The criminologist, Mr. Grodsky, also testified that two of the bullets fired into the officer's body had been fired at extremely close range, which would indicate that the shots had not all been fired at the same time.
>
> The district attorney properly used the manikin in his argument in support of his theory as to how the crime was committed, particularly that it tended to show that the murder was a cold-blooded killing.

People v. Robillard, supra, 55 Cal.2d at pp. 99-100. Thus, the mannequin in *Robillard* was *directly relevant to a contested issue* as to how the shooting occurred. Moreover, there was no indication that the mannequin in *Robillard* was dressed in the officer's bloodied uniform, was realistic in any way, or was otherwise highly prejudicial.

Robillard was followed by the Court in *People v. Brown, supra,* 46 Cal.3d at pp. 442-443:

> Defendant asserts the court abused its discretion in permitting the People to use a mannequin dressed in Officer Reed's full uniform to illustrate the type and placement of wounds received by the victim *in order to support their theory that defendant knew when he fired his weapon that Reed was a peace officer.* The record shows the court carefully considered and rejected defendant's claim that use of the dressed mannequin was unreasonably prejudicial, noting that the holes with two blood stains on the shirt were scarcely visible, and because the dressed mannequin showed how Reed looked when he was shot, it was relevant to the charged special circumstance. We conclude use of the mannequin was "a perfectly proper method of introducing highly relevant evidence" (*People v. Robillard* (1960) 55 Cal.2d 88, 99) and that the court's ruling was within its discretion. (*People v. Green* (1980) 27 Cal.3d 1, 25; *People v. Stone* (1983) 139 Cal.App.3d 216, 224, fn. 2.)

Thus, in *People v. Brown* as in this case, the mannequin of the officer was dressed in uniform, but unlike this case, the bloodstained holes were only two, and "scarcely visible." There was no showing that the mannequin had full facial features, or was particularly realistic. Nor was the mannequin in *Brown* introduced into evidence along with a jury view of a police vehicle that had been destroyed by gunfire, exacerbating the prejudice. Most importantly, the uniformed mannequin in *People v. Brown* was *directly relevant to a contested special circumstance issue* – whether defendant actually knew, when he fired the shot that killed the victim, that the victim was a police officer. The defendant argued that he did not. *People v. Brown*, 46 Cal.3d at p. 444 & fn. 7.

In *People v. Cummings* (1993) 4 Cal.4th 1233, 1291, the Court faced a similar situation:

> Defendants argue that the court abused its discretion in permitting the prosecution to use a mannequin to illustrate the paths of the six bullets through the body of Officer Verna. Using dowels to demonstrate those paths, the prosecution attempted to assist the

> jury in understanding the testimony of the expert witnesses, forensic pathologists. The prosecution expert had testified that the path of bullet number 6 was consistent with a bullet shot from within the car as the victim leaned over and into the car. The defense expert, who disagreed with the prosecution expert on one of the shots, did not dispute the theory that the first shot, number 6, could have been fired in that manner.

People v. Cummings, supra, 4 Cal.4th at p. 1291. This Court determined that the trial court

> did not err. Mannequins may be used as illustrative evidence to assist the jury in understanding the testimony of witnesses or to clarify the circumstances of a crime. (*People v. Robillard* (1960) 55 Cal.2d 88, 99-100; *People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 316.) Photographs of an accurate reconstruction of an event in issue are also admissible. (*People v. O'Brien* (1976) 61 Cal.App.3d 766, 780.) *The issues to which this evidence was relevant were hotly disputed.* The expert testimony was confusing at times. The probative value of the evidence clearly outweighed any prejudice to Cummings.

People v. Cummings, supra, 4 Cal.4th at p. 1291 (emphasis added). Thus, not only was the mannequin in *Cummings* apparently not dressed in the officer's uniform, or especially realistic; the use of the mannequin in *Cummings* was also *directly relevant to a "hotly disputed" issue. Id.*

People v. Thomas (2012) 53 Cal.4th 771 was similar. There, the opinion found that the trial court permissibly allowed a coroner to use mannequins in his guilt-phase testimony to illustrate the trajectories of bullets that killed two officers. The testimony was directly relevant to the issue of premeditation (*id.* at pp. 805-807), which was one of only two contested issues at trial (*id.* at p. 802). And there is no indication that the mannequins had full facial features, or were particularly realistic, or that they were dressed in the uniforms of the officers.

A related question, involving the admission of photographs of a mannequin rather than the mannequin itself, was addressed by this Court in *People v. Fuiava* (2012) 53 Cal.4th 622, 674:

> Defendant contends on appeal that the trial court abused its discretion by admitting several photographs of a mannequin dressed in Deputy Blair's undershirt, bulletproof vest and uniform shirt illustrating the location of the bullet holes in these items and the possible trajectory of the bullets. . . . [T]he jury properly could have considered the photographs in determining the manner in which Deputy Blair had been killed.

Just as in the previous cases, in *People v. Fuiava*, the trajectories illustrated by the mannequin were *directly relevant to a contested issue* – whether, as defendant claimed, he shot the deputy only after the deputy shot at him. *Fuiava, supra*, 53 Cal.4th at pp. 635, 641, 637.[96] Moreover, *Fuiava* is unlike this case for several important additional reasons, including the defendant's failure to object (*id.* at p. 674), and, most critically, the fact the the evidence at issue was not the actual, life-like mannequin itself, dressed in the actual clothes of the officer-victim, in the room with the jury, but merely *photographs* of the mannequin, which inevitably carry a less potent emotional charge.

Thus, this Court's cases involving the admission of law enforcement mannequins over the last half-century are consistent with each other. They are also consistent with the leading non-California case that considered whether a mannequin representing a slain law enforcement officer was admissible at trial, concluding it was not.

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[96] The Court noted that "[t]he trajectories of the bullets passing through Blair's body were consistent with his leaning forward and turning when he was hit" (*People v. Fuiava, supra*, 53 Cal.4th at p. 637), which would tend to disprove that the deputy had fired his weapon at the defendant before he was hit, as the defendant claimed (*id.* at p. 635).

That case is *People v. Blue* (2000) 189 Ill.2d 99, 724 N.E.2d 920. In *Blue*, the defendant had been convicted of the murder of a police officer and sentenced to death. On appeal to the Illinois Supreme Court, he argued

> that the trial court abused its discretion by admitting the bloodied and brain-splattered uniform of [Officer] Daniel Doffyn into evidence and permitting the uniform to be taken into the jury room during deliberations. . . . The uniform, consisting of Doffyn's shirts, police jacket and bullet-proof vest, contained bloodstains and stains from Doffyn's brain matter. Also, the clothing was torn as a result of medical treatment rendered to Doffyn.

People v. Blue, supra, 724 N.E.2d at p. 931.

> The State displayed the uniform on a headless torso mannequin during the State's case in chief.

People v. Blue, supra, 724 N.E.2d at p. 931. The Illinois Supreme Court, in a unanimous opinion, reversed the conviction and sentence of death. The court based its ruling on cumulative error, but the primary error in the court's analysis was the admission and display of the mannequin in uniform. *Id.* at pp. 923, 930-934.

The Illinois Supreme Court found that several of the reasons the prosecution advanced in support of the mannequin in uniform were unpersuasive, but that the mannequin in uniform could corroborate the medical testimony describing the placement or nature of the fatal wounds. Yet, the court observed, because there was ample testimony from a paramedic and the medical examiner, and 16 autopsy photographs were admitted, "the evidentiary value of the uniformed mannequin--over and above the other proof introduced by the State--was minimal." *People v. Blue, supra*, 724 N.E.2d at at p. 934.

The *Blue* court then considered the actual but marginal probative value of the mannequin display as weighed against the potential for prejudice, and determined that the evidence should not have been admitted.

> the physical evidence here was not photos of a gruesome scene, but the actual remnants of the scene itself, spattered with the actual blood and brains of the victim.

People v. Blue, supra, 724 N.E.2d at at p. 934. Moreover, the Illinois Supreme Court recognized,

> These are not just bloody clothes, but the clothes of a police officer, which, as the defendants noted in *Burrell*, 228 Ill.App.3d at 144, 170 Ill.Dec. 17, 592 N.E.2d 453, are uniquely "charged with emotion."

People v. Blue, supra, 724 N.E.2d at at p. 934. The court also found it significant that the jury knew that the uniform had been spattered with brains, that the jury was in the presence of the mannequin for an extended period, and that the trial judge had furnished the jurors with gloves. *Id.* thus, the Illinois Supreme Court concluded,

> the nature and presentation of the uniform rendered the exhibit so disturbing that its prejudicial impact outweighed its probative value. Its admission into evidence was error.

People v. Blue, supra, 724 N.E.2d at at p. 934.

People v. Blue resembles this case in at least one critical respect – in *Blue* as in this case, the mannequin in uniform had minimal or no evidentiary value. But *Blue* is also dissimilar in another crucial respect – in *Blue*, the uniformed mannequin did not depict the officer, because the mannequin was headless. *People v. Blue, supra*, 724 N.E.2d at p. 931.

Here, by contrast, the mannequin was specifically intended by the prosecution to "depict" Deputy Riches (9 CT 2242), and was a full, realistic

mannequin with a handsome head, including full facial features, blue eyes and a wig. In view of the high degree of realism of the head of the mannequin "depicting" the homicide victim in this case – the specific head "depicting" Deputy Brad Riches – the life-like mannequin was likely far more prejudicial than would be an otherwise similar mannequin, but with no head.

E. Admission of the Life-Like Mannequin Depicting Deputy Riches Was Not Probative of Any Contested Issue, Was Highly Prejudicial, and Violated Due Process.

The mannequin in this case was not irrelevant – as noted above, the prosecutor relied on it in his direct examination of the pathologist, Dr. Fukumoto, to show the trajectories of the bullets that struck and killed Deputy Riches. This evidence related to factor (a), the circumstances of the crime. But the mere fact that evidence is relevant does not mean it is also more probative than prejudicial. Not all relevant evidence is equally probative. In order to determine whether the trial court erroneously admitted the mannequin, it is necessary first to assess the degree of probative value the mannequin possessed in the context of the evidence and contested issues in this case.

Critically, the mannequin in uniform depicting Deputy Riches was not probative of any actually contested issue at trial.

The prosecutor explained his theory of admissibility of the mannequin itself as follows:

> The purpose for offering that evidence is to show the circumstances of this crime. The evidence does illustrate how this officer was mortally wounded.
>
> The pathologist has, based on his examination of the body, has determined the impact points of a number of rounds into Deputy Riches, has illustrated

> that with rods into the mannequin, and we feel that that should be admissible evidence, that that type of evidence has been found to be admissible in the past in various cases. I think it will also be helpful to the jury in understanding the pathologist's testimony on those points.

(16 RT 3054.) In his offer of proof, the prosecutor admitted that he intended to "dress up" the mannequin. (16 RT 3054-3055.) As to the clothing on the mannequin, the prosecutor stated:

> The mannequin is dressed as Deputy Riches was dressed on the early morning of June 12th, 1999, at the time Mr. Steskal shot him. So, the mannequin depicts what Mr. Steskal saw with respect to the status of the victim; i.e., that he was an officer in the performance of his duties at the time Mr. Steskal shot him. In addition to him, the victim, being in the marked police unit.
>
> So, it goes to Mr. Steskal's state of mind at the time of the shooting, and it goes to the heart of the (a) factor special circumstance of killing a police officer during the commission of the crime -- in the commission of his duties.

(16 RT 3054.) The prosecutor later added that the vest, Exhibit 60, "represents the firing power that the defendant chose to use to kill Deputy Riches," and thus demonstrated malice. (35 RT 6663.)

The prosecutor's offer of proof reveals that the mannequin in uniform depicting Deputy Riches was, indeed, relevant – but it was relevant *only* to circumstances of the crime as to which there was no factual dispute.

There was no factual dispute that Mr. Steskal shot and mortally wounded Deputy Riches, firing his weapon repeatedly.

There was no factual dispute that Deputy Riches was an officer in the performance of his duties when Mr. Steskal shot him.

There was no factual dispute that Mr. Steskal knew that Deputy Riches was a law enforcement officer at the time of the crime.

And there was no factual dispute that Mr. Steskal used an extremely powerful weapon – an AK-47 knock-off semi-automatic rifle – to kill Deputy Riches.

Not only was there an absence of dispute as to the existence of these circumstances of the crime; there was also abundant other evidence that was proof of the same undisputed matters.

The prosecution introduced and the jury viewed the surveillance video from the 7-Eleven, which recorded the events. Although there is no direct view of Deputy Riches, it is quite clear from the videotape what transpires. As the prosecutor at the first trial told the jury, because of the 7-Eleven surveillance videotapes, identification was not at issue in this case. (12 RT 2228-2229.)

Indeed, in his opening argument to the penalty phase retrial jury, the prosecutor described the videotaped evidence of the killing:

> We were very fortunate in this case. We were fortunate that the 7-Eleven store had a videotape camera running that captures the front door to the 7-Eleven and the register area. We were also very fortunate, extremely fortunate, that the camera angle is looking out the front window.
>
> I think you are going to see -- and we are going to show this in just a second, but you are going to see this video. You cannot look at that video too many times, because every time you look at that video you see more things in it.
>
> There is a reflection on the front window that you are seeing some of the things back in the store. In

> fact, in the reflection you are going to see the clerk going back and forth because she is -- she is just an emotional mess because she witnesses this.
>
> *You can also see past that reflection and see the -- what's going on out there.* ***You are going to actually see the defendant doing this 30-round sweep of the killing of Deputy Riches***.

(20 RT 3976-3977 (emphasis added).) The prosecutor then played the 7-Eleven videotape – Exhibit 55 – for the jury (10 CT 2500), adding his own narration. 20 RT 3978-3980. The videotape was played again during the testimony of witness David Cavallo (20 RT 4082-4083, 10 CT 2501), and again during the testimony of store clerk Vickie Delara (20 RT 4101, 10 CT 2502). These witnesses described events that were also shown in the surveillance video. Again, in his closing argument, the prosecutor played the videotape for the jury, provided even more detailed narration. (36 RT 6819-6823.)

The jury also heard the testimony of Deputy Steven Torres and Sgt. Ron Acuna, officers who arrived at the 7-Eleven minutes after Deputy Riches had been shot, and described what they had seen. (21 RT 4225-4232; 21 RT 4196.) Additionally, the jury heard at length regarding the fatal and nonfatal wounds from Dr. Richard Fukumoto, an experienced forensic pathologist. (20 RT 4019-4034.) Dr. Fukumoto had also provided detailed testimony at the first trial without the aid of a mannequin (7 RT 1297-1308); he recapitulated essentially the same testimony using the mannequin at the penalty phase re-trial.[97]

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[97] There is no indication in the record that the jurors in the first trial were confused or misled by the testimony of this experienced forensic pathologist as to any aspect of the causes of Deputy Riches' death, or the nonfatal wounds inflicted, let alone that a life-like mannequin would be helpful in dispelling any such confusion.

Over defense objection, the jury was also taken for a view of Deputy Riches' patrol vehicle. (10 CT 2550.) See Argument X, *infra*.

Thus, it is clear that the uniformed mannequin "depicting" Deputy Riches was not only not relevant to any contested issue at the penalty phase re-trial; to the extent it was relevant to uncontested issues, it was entirely cumulative to other prosecution testimony, both expert and non-expert, and other physical evidence -- including the repeatedly-shown videotape of the actual events -- that more than amply demonstrated the uncontested factual matters the prosecution assertedly sought to prove by using the mannequin.

Thus, in this case, just as in *People v. Blue*, "the evidentiary value of the uniformed mannequin--over and above the other proof introduced by the State--was minimal." *People v. Blue, supra*, 724 N.E.2d at at p. 934.[98]

Indeed, though the trial court considered argument on the mannequin, the trial court failed to recognize that the uniformed mannequin was not probative of any *contested* issue at the penalty phase re-trial.

Against the minimal evidentiary value, if any, of the uniformed mannequin to the prosecution's proof of uncontested issues, the trial court was required to balance whether admission of the mannequin would "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence Code section 352.

The very *purpose* of the prosecutor's use of the mannequin was to provoke an emotional response from the jurors, not to convey information to them.

[98] Even when proffered evidence is, taken by itself, somewhat probative, if in the context of the total evidence it is cumulative, as it is here, it has little probative value in the Evidence Code section 352 equation. See *People v. Ewoldt, supra*, 7 Cal.4th 380, 405-406 ("[i]n many cases the prejudicial effect of . . . evidence would outweigh its probative value, because *the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute*") (emphasis added).

As noted elsewhere, the undue prejudice with which Evidence Code section 352 is concerned applies to "evidence which uniquely tends to evoke an emotional bias against the defendant." *People v. Karis, supra,* 46 Cal.3d at p. 638.

The trial court ultimately failed to recognize the extreme potential for prejudice presented by the uniformed mannequin.

The mannequin in this case was life-sized. Deputy Riches was quite tall – about six feet six inches (see 24 RT 4732 [Deputy Riches was "a gentle giant"]) – and the mannequin wearing his clothes was a similar, physically imposing size.

The mannequin was blood- and vomit-spattered. (20 RT 3936.)

The mannequin is not a dressmaker's dummy. The mannequin has a head, with full facial features. Like mannequins on display at the world's most expensive department stores, the head of the the mannequin "depicting" Deputy Riches is that of a strikingly handsome young man.

The mannequin has vivid blue eyes. The mannequin is wearing a hairpiece. (10 CT 2598.)

Dressed complete in Deputy Riches' complete uniform – his shirt, his Sam Browne belt, his pant, his shoes (20 RT 4011) – the mannequin might, at first glance, be taken not for a mannequin – but for a man.

This clearly served the prosecution's inflammatory intention in seeking the admission of a mannequin "depicting Deputy Riches." (9 CT 2242.)

This life-like mannequin-man in the uniform of a slain officer was "uniquely 'charged with emotion.'" *People v. Blue, supra*, 724 N.E.2d at at p. 934.

Moreover, the mannequin-man "depicting" Deputy Riches was presented in an especially unforgettable way.

Deputy Riches had suffered 30 gunshot wounds. (20 RT 4020-4034.) In the testimony of the pathologist, Dr. Richard Fukumoto, the prosecutor had the pathologist place pink fluorescent rods through the bullet holes to indicate the bullet trajectories. (20 RT 4019-4034, 4037.)

In the deputy's blood- and vomit-stained uniform, pierced with bright pink trajectory rods, the mannequin-man carries the unmistakable, unforgettable visual suggestion of a modern martyr – a present-day Saint Sebastian, in the uniform of an officer slain in the line of duty.[99]

The mannequin-man depicting Deputy Riches is precisely the sort of evidence that is virtually guaranteed to elicit an emotional response in jurors, and spark an almost guaranteed bias against the defendant who caused this horrible martyrdom.

In view of the minimal non-cumulative probative value, if any, of the mannequin to uncontested issues, and the absence of any probative value for the mannequin on contested issues, it was clearly an abuse of discretion for the trial court to admit the mannequin under Evidence Code section 352. Moreover, in light of the same factors, and the likely inflammatory impact of the mannequin on the penalty phase re-trial jurors, it must be concluded that the admission of the mannequin was so unduly

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[99] The image of Saint Sebastian, the saint tied to a tree and pierced by multiple arrows, is a familiar one of Christian iconography, and because of its religious power and emotive force, it is the subject of a number of paintings by distinguished artists of the Italian Renaissance, such as Botticelli, Mantegna, and Titian, as well as later artists such as Daumier.

The image remains mythically persistent in art and the subconscious. See, e.g., R.E.M., music video for "Losing My Religion" (1991) http://www.youtube.com/watch?v=if-UzXIQ5vw (last viewed May 19, 2014).

prejudicial that it rendered the trial fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment. *Payne v. Tennessee, supra,* 501 U.S. at p. 825. Error that renders a trial fundamentally unfair violates due process guarantees. *Donnelly v. DeChristophoro*, *supra*, 416 U.S. at p. 645. Furthermore, because death is indeed different, the Eighth Amendment demands a heightened degree of "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina, supra,* 428 U.S. 280, 305. Here, the uniformed, full-featured mannequin was not relevant to any legitimate disputed issue, and was, on its face, highly prejudicial, inflammatory evidence. Its erroneous admission rendered the penalty phase trial unreliable and fundamentally unfair, and violative of the Eighth and Fourteenth Amendments.

F. The Judgment of Death Must Be Reversed.

The applicable standards of prejudice for penalty phase error – the reasonable possibility standard of *People v. Brown*, *supra*, 46 Cal.3d 432, 448, and the federal "beyond a reasonable doubt" standard of *Chapman v. California*, *supra*, 386 U.S. 18, 24 – have been discussed above. They are the same in substance and effect. Under either standard, the death judgment must be reversed.

This was not a case in which death was a foregone conclusion. As noted above, the first jury was unable to reach a penalty verdict, but divided 11-to-1 in favor of a life verdict. (14 RT 2743-2744.) The second jury returned a verdict of death. While the sheer volume of prosecution evidence introduced at the penalty phase re-trial was much greater – more than double the volume of similar evidence at the first trial, a striking

qualitative difference between the first trial and the second is clearly that the life-sized, life-like mannequin "depicting Deputy Riches" was introduced into evidence in the second trial, but was absent in the first.

Under the applicable standard of prejudice, "[t]o say that an error did not contribute to the ensuing verdict is ... to find that error *unimportant* in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt* (1991) 500 U.S. 391, 403, 111 S.Ct. 1884, 114 L.Ed.2d 432 (emphasis added).

The prosecution in this case did not cryogenically preserve Deputy Riches' bullet-ridden corpse, then drag it into the courtroom so that the penalty phase re-trial jurors could be fully enlightened as to *all* the circumstances of the crime. But the visceral, in-person impact of the mannequin of Deputy Riches in the slain man's bloodied clothes is almost as shocking.

Here, it cannot fairly be said that the erroneous admission of the strikingly life-like mannequin was unimportant in relation to everything else the jury considered on the ultimate question before it. The judgment of death must be reversed.

X. BY AUTHORIZING A JURY VIEW OF DEPUTY RICHES' GUNFIRE-DEVASTATED PATROL VEHICLE AT THE PENALTY PHASE RE-TRIAL, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR.

A. Introduction.

Deputy Riches was seated in the driver's seat of his patrol car at the Lake Forest 7-Eleven when he was shot to death. The vehicle was hit by numerous rounds of rifle fire at close range. The car was essentially destroyed. At the guilt phase, the trial court characterized the vehicle itself as a "horrible piece of evidence." 3 RT 492. Yet, as discussed above in Argument IV, the trial court erroneously allowed a jury view of the patrol car at the guilt phase trial.

At the penalty phase re-trial, over defense objection, the trial court committed the same error again. The prosecution sought a jury view at the penalty phase and again, appellant objected, contending that a jury viewing of Deputy Riches' patrol car would be cumulative, that the prejudicial impact would substantially outweigh any probative value, and that a jury view would violate federal due process guarantees. (23 RT 4529, 4534.)

Without comment or explanation, the trial court overruled the defense objection. (23 RT 4535; 10 CT 2598.)

Thereafter, in the company of a deputy, the penalty phase re-trial jury viewed the patrol vehicle. The view took 10 minutes. (23 RT 4538-4539.)

The patrol vehicle had no probative value as to any disputed factual issue. And while it was relevant to undisputed matters, the jury view of the patrol car was cumulative to a large quantity of other prosecution evidence. It had minimal non-cumulative probative value, if any.

Yet the immense inflammatory power of the patrol vehicle is manifest only on an actual view of the vehicle itself.[100] While the information to be gleaned from a view of the vehicle could just as easily be served by photographs, pictures cannot convey the emotional power of the patrol vehicle when experienced in three-dimensional, live space and real time.

It is a death scene.

The trial court abused its discretion in authorizing a jury view of the patrol vehicle, and the evidence was so inflammatory and unduly prejudicial as to deny Mr. Steskal his federal constitutional rights to due process of law, and to a fair and reliable penalty phase re-trial.

B. Legal Standards.

As we have seen in connection with Argument IV, Penal Code section 1119 authorizes jury views, including views of "personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom." A jury's view is independent evidence. See *People v. Garcia, supra,* 36 Cal.4th 777, 798 [jury view is receipt of evidence]; *People v. Bolin, supra,* 18 Cal.4th 297, 325.

Under Evidence Code section 352, the court must determine whether the "probative value" of the evidence sought to be admitted is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A court's ruling on a party's motion for a jury view is

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[100] Appellate counsel has, of course, personally viewed the vehicle, as well as the other inflammatory exhibits, such as the mannequin "depicting" Deputy Riches.

reviewed for abuse of discretion. *People v. Williams, supra,* 16 Cal.4th 153, 212, 213.

C. The Trial Court Abused its Discretion and Violated Mr. Steskal's Federal Constitutional Rights By Authorizing a Jury View of Deputy Riches' Devastated Patrol Vehicle at the Penalty Phase Re-Trial.

Mr. Steskal's objection to the jury view of the patrol vehicle should have been sustained, because the jury view was cumulative and unduly prejudicial under Evidence Code section 352, and inflammatory and fundamentally unfair under the Fifth, Eighth and Fourteenth Amendments.

The jury view of the vehicle was not relevant to any contested issue of fact at the penalty phase re-trial. There was no dispute as to the cause of death, the number of shots fired, the condition of the vehicle, or any other matter to which a jury view of the patrol vehicle was relevant.

Regarding undisputed matters, trial counsel argued to the court that the jury view was entirely cumulative to testimony and evidence that had been or would be admitted at the penalty phase re-trial. (23 RT 4530-4534.) The testimony included the following:

• Dr. Richard Fukumoto, the pathologist who performed the autopsy, testified as to the number and nature of the wounds. (20 RT 4019, 4034, 4036-4037.) The prosecution was allowed to place before the jury the mannequin depicting Deputy Riches, with trajectory rods placed in the mannequin. (20 RT 4022-4034.)

• Robert Bombalier, the first person to approach the patrol car after the shooting, testified as to what he saw when he did so. (21 RT 4156-

4170.) He further testified regarding People's Exhibit 7, a photograph of the patrol vehicle taken from the front at the scene of the shooting.

• Deputy Steven Torres and Sgt. Ron Acuna each testified to the position of Deputy Riches' body in the car, described the wounds to Deputy Riches, described checking for vital signs, and described the condition of the patrol vehicle. (21 RT 4196, 4225-4232.)

• Deputy Adam Powell testified as to his arrival at the scene of the shooting, and as to the condition of the car that made him apprehensive as to making a stop of appellant. (22 RT 4328, 4331.)

• Elizabeth Ann Thompson, a senior forensic scientist with the sheriff's department crime lab, documented evidence and conditions at the crime scene after initially arriving there at about 2:30 AM on June 12. She described the scene, and described the condition of the patrol vehicle. (22 RT 4375-4378.)

The jury also saw numerous photographs.

Photograph No. 11 is a photograph of Deputy Riches' car. (22 RT 4408.)

Photograph No. 12 shows the radio microphone sitting on the floorboard of the vehicle. (22 RT 4408.)

Photograph No. 13 is a photograph of the interior of the car, taken through the front windshield. (22 RT 4408.)

Photograph No. 14 is a photograph of the dashboard. (22 RT 4408.)

Photograph No. 15 is another photograph of the interior. (22 RT 4409.)

Photograph No. 16 is a different photograph of the car. (22 RT 4409.)

Photograph No. 17 is a photograph of a gun set on the front seat of the car. (22 RT 4414.)

Photograph No. 25 is a photograph of Deputy Riches' patrol car, with the trajectory rods in it.

Photograph No. 26 is another photograph of Deputy Riches' car, with trajectory rods in it.

Given this testimony and evidence, the jury view was cumulative.

The only purpose of this evidence was to incite the jury. Since the jury view of the patrol vehicle had no additional probative value, and since jury view was clearly prejudicial, it was an abuse of discretion to admit the evidence. Moreover, its admission also violated the federal due process guarantee of fundamental fairness, and rendered the resultant verdict unreliable and unable to survive Eighth Amendment scrutiny.

As a general rule violations of state evidentiary principles do not implicate the federal and state constitutions. But there are limits.

"In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee, supra,* 501 U.S. 808, 825; see *Lisbena v. California* (1941) 314 U.S. 219, 228, 62 S.Ct. 280, 86 L. Ed. 166. Admitting evidence as shocking as the jury view of the patrol vehicle under circumstances in which it bears little probative value on the issues was unduly prejudicial, resulting in a fundamentally unfair trial.

Further, the jury view of the patrol vehicle violated appellant's right to a reliable capital-sentencing determination. See *Woodson v. North Carolina, supra,* 428 U.S. 280, 305 [requiring heightened reliability for capital-sentencing determination]. "It is of vital importance to the

defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida* (1977) 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393. The jury view of the patrol car targeted the jurors' emotions, rather than their reason, thus improperly affecting their deliberations and verdict.

D. The Error Was Prejudicial.

The admission of the jury view was prejudicial under *Chapman v. California*, *supra*, 386 U.S. 18, 24 and *People v. Brown*, *supra*, 46 Cal.3d 432, 448.

It is illuminating to consider the jury view of Deputy Riches' devastated patrol vehicle in light of studies of the effects, not of jury views of well-preserved death scenes (there are no such studies), but of jury views of another type of powerful evidence, photographs.

Studies have recognized that graphic photographs have the power to arouse jurors' emotions: "Juries are comprised of ordinary people who are likely to be dramatically affected by viewing graphic or gruesome photographs." Rubenstein, *A Picture Is Worth a Thousand Words–The Use of Graphic Photographs as Evidence in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197; see Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Behav. 485, 491-492 [documenting jurors' emotional reactions to viewing graphic photographs of murder victim]; Kelley, *Addressing Juror Stress: A Trial Judge's Perspective* (1994) 43 Drake L.Rev. 97, 104 [recounting juror's

posttraumatic-stress symptoms experienced after viewing graphic photos of murder victim].

Studies also show that graphic photographs influence the verdicts that juries return. Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am. J. Trial Advoc. 549, 563 [juries that viewed autopsy photographs during medical examiner's testimony were more likely to vote to convict defendant than those not shown photographs]; Douglas et al., supra, 21 Law & Hum. Behav. at p. 492-494 [same].

The belief that the introduction of gruesome photographs causes jurors to ignore other evidence is supported by empirical study. It has been demonstrated that after viewing graphic photographs, jurors tend to prematurely reach a determination that the defendant should be sentenced to death. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev. 1476, 1497-1499 [noting jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].

But photographs themselves – no matter how vivid, detailed or shocking they may be, and regardless of such factors as exposure apertures or pixel-counts – are always, and inevitably, at one step removed. They are representations of the thing – not the thing itself.[101]

And thus, the viewer of the photograph is at one step removed from the direct experience of the object. Emotional distance is still possible.

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[101] The great American Modernist poet, lawyer and insurance executive Wallace Stevens titled one poem: "Not Ideas About the Thing, But the Thing Itself." See, e.g., http://www.youtube.com/watch?v=iZyX1LdfKmQ (last viewed July 12, 2014).

The car is not a representation. It is the thing itself. And, as the trial court articulated, it is a "horrible" thing.

Words, and photographs, are simply inadequate to convey the emotional impact of the presence, in real-time, in metal, glass and fabric, of Deputy Riches' patrol vehicle. In the driver's seat area, metal is shredded and ripped with bullet-holes; glass is shattered and lies in tiny pieces; and fabric is torn and blood-soaked. This is where Deputy Riches died, in the tight space of the driver's seat, in this metal compartment destroyed by gunfire.

This death scene is extreme, far outside the experience of even criminal justice professionals. No lay juror viewing this violent death scene could possibly be unaffected. The emotional distance possible with even the most gruesome photographs is impossible for a juror in the actual, physical presence of this scene of an extremely violent death.

It will be impossible for the prosecution to meet its burden to show that the jury view of the destroyed patrol car, with its unavoidable and overwhelming emotional impact, was unimportant in relation to everthing else the jurors considered on the question of penalty. *Yates v. Evatt, supra,* 500 U.S. 391, 403.

XI. THE TRIAL COURT VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS BY PERMITTING THE PROSECUTION TO INTRODUCE PHOTOGRAPHS OF THE AUTOPSY AND THE PATROL CAR.

A. Background.

In addition to the lengthy testimony at Mr. Steskal's penalty phase re-trial, and the extensive physical evidence the trial court admitted – including the mannequin dressed in Deputy Riches' blood- and vomit-stained uniform, and the jury view of the deputy's bullet-ridden patrol car – the prosecution also sought to introduce numerous photographs that were cumulative and prejudicial.

Defense counsel objected to the admission of three autopsy photographs, depicting gunshot wounds to the deputy's right hand, wrist and index finger, on the grounds of relevance, due process and violation of Evidence Code section 352. (10 CT 2500-2501, 2600; 35 RT 6665, 35 RT 6758.) The trial court overruled the objections. (10 CT 2598; 35 RT 6666; 35 RT 6758.)

Defense counsel also objected to Exhibits 10 through 17, and Exhibits 23 through 26. Exhibits 10 and 11 are photographs of the hood of Deputy Riches' car; Exhibits 13, 14, 15, 16 and 17 are also photographs of the destroyed patrol vehicle; Exhibits 25 and 26 are photographs of the car with trajectory rods in it. (35 RT 6672.) The trial court overruled the defense objections to these exhibits as well. (35 RT 6673.)

The trial court erred. The evidence should have been excluded as cumulative and unduly prejudicial under Evidence Code section 352, and as inflammatory and fundamentally unfair under the Fifth, Eighth and Fourteenth Amendments.

B. The Admission of The Prejudicial Photographs Violated Evidence Code Section 352.

The trial court's determination that the photographs were more probative than prejudicial was erroneous and an abuse of discretion. See *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269 (recognizing admission of gruesome photographs may deprive defendant of fair trial and require reversal of judgment).

As a general rule, "[t]he trial court's exercise of discretion in determining relevance and the admissibility of photographs will not be disturbed on appeal unless their probative value clearly is outweighed by their prejudicial effect." *People v. Hughes* (2002) 27 Cal.4th 287, 336.

The determination of the probative value of evidence is inextricably bound to the issue of whether the evidence is relevant. Even assuming that as a general rule photographs depicting the manner in which a victim was injured are relevant to the determination of malice, aggravation and penalty (see *People v. Farnam* (2002) 28 Cal.4th 107, 185-186), this Court has never held that this automatically qualifies photographs for admission at a capital trial. In fact, this Court has observed that trial courts should be alert to how gruesome photographs play on a jury's emotions, especially in a capital trial. *People v. Weaver, supra,* 26 Cal.4th at p. 934 (considering whether admission of gruesome photographs denied appellant a fair penalty phase determination).

In this case, as discussed more fully in the preceding argument relating to the jury view of the patrol vehicle, there was no issue as to the cause of death. There was no issue as to the nature or number of gunshot wounds. There was no issue as to the identity of the perpetrator, or as to whether the victim was an officer engaged in the performance of his duties.

There was no issue as to the number of rounds fired, or the trajectory of those rounds. There was no issue as to the condition of the patrol vehicle. (35 RT 6654-6655.)

All the evidence sought to be introduced via these photographs was both directed at matters not in dispute, and entirely cumulative to other evidence.

As discussed in the preceding argument regarding the jury view of the death-scene vehicle, empirical studies have recognized that juries "are likely to be dramatically affected by viewing graphic or gruesome photographs." Rubenstein, *A Picture Is Worth a Thousand Words–The Use of Graphic Photographs as Evidence in Massachusetts Murder Trials, supra,* 6 Suffolk J. Trial & Appellate Advoc. 197; see Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?, supra,* 21 Law & Hum. Behav. 485, 491-492; Kelley, *Addressing Juror Stress: A Trial Judge's Perspective, supra,* 43 Drake L.Rev. 97, 104. Moreover, studies also show that graphic photographs influence the verdicts that juries return. Miller & Mauet, *The Psychology of Jury Persuasion, supra,* 22 Am. J. Trial Advoc. 549, 563 (juries that viewed autopsy photographs during medical examiner's testimony were more likely to vote to convict defendant than those not shown photographs); Douglas et al., *supra*, 21 Law & Hum. Behav. at p. 492-494 (same).

Logic supports this conclusion, because jurors' decisions at the penalty phase are far more discretionary and less constrained by law than their decisions at the guilt phase. See *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 ("The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the

establishment of hard facts."). Thus, a jury's death-sentencing discretion at the penalty phase is much more likely to be affected by evidentiary items such as inflammatory photographs.

The autopsy and crime-scene photographs played a prominent role in appellant's trial. Moreover, these photos had little if any probative value. The trial court, therefore, erred in finding that the photographs were not unduly prejudicial.

The erroneous admission of the photographs requires reversal of appellant's death sentence. The research shows that this particular type of evidence has an impact on jurors that tends to preclude serious consideration of the defense evidence. For this reason, it is reasonably probable that appellant would not have been sentenced to death if the jury had not seen these highly inflammatory photographs. See *People v. Watson, supra,* 46 Cal.2d 818, 836.

C. The Admission of the Photographs Violated Appellant's Constitutional Rights.

The admission of these photographs also infringed the Sixth, Eighth, and Fourteenth Amendment rights of appellant, as well as his rights guaranteed by article I, sections 7, 15, 17, and 24 of the California Constitution, to a fair trial and a reliable capital sentencing proceeding.

Although as a general rule violations of state evidentiary principles do not implicate the federal and state constitutions, in this case the admission of the photographs prevented appellant from getting a fair trial and thus violated his constitutional rights. See *Lisenba v. California, supra,* 314 U.S. 219, 228 (recognizing state court's admission of prosecution evidence that infuses trial with unfairness would violate defendant's right to due process of law).

"In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee, supra,* 501 U.S. 808, 825. Admitting photographs as graphic as the ones in this case under circumstances where they bore little probative value to the issues rendered them unduly prejudicial resulting in a fundamentally unfair trial.

Moreover, the admission of these photographs violated appellant's right to a reliable capital-sentencing determination. See *Woodson v. North Carolina, supra,* 428 U.S. 280, 305 (requiring heightened reliability for capital-sentencing determination). "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida, supra,* 430 U.S. at p. 358. The admission of the photographs evoked the jurors' emotions, rather than their reason, thus improperly affecting their deliberations and verdict.

As discussed above, there is a great danger that when exposed to photographs like those at issue here, jurors will foreclose consideration of other evidence and render their verdict based upon the emotional impact of the photographs. The result of the admission of this evidence is the failure to consider defense evidence, and the failure to consider mitigating evidence, in violation of Eighth Amendment principles. See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399, 107 S.Ct. 1821, 95 L.Ed.2d 347; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1.

In the present case, in order to offset the trial court's constitutional errors in admitting the photographs at appellant's trial, the prosecution must show that their admission was harmless beyond a reasonable doubt. See *Chapman v. California, supra,* 386 U.S. 18, 24. To meet this burden, the prosecution must demonstrate two things: First, that the introduction of the photographs did not improperly affect the way the jurors approached the decision of life versus death. Second, that the jury would have rendered its verdict without the introduction of the photographs. The first must be shown in order to overcome the likelihood that the photographs so impacted the jurors that they disregarded other evidence, and the second is necessary because if the jury would not have returned a death verdict without the introduction of the photographs then they obviously affected the verdicts.

And since a death verdict is never required or preordained by the state of the evidence (see *Woodson v. North Carolina, supra*, 428 U.S. at p. 301 [holding Eighth Amendment precludes automatic imposition of death penalty for first-degree murder]), this is an especially difficult burden for the prosecution to bear. The facts of this case hardly render a death verdict an inevitability. "The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability." *Hendricks v. Calderon, supra*, 70 F.3d at p. 1044. In this case, that would involve weighing the statutory factors concerning appellant against appellant's culpability. Under these circumstances, the prosecution cannot demonstrate beyond a reasonable doubt that admission of the photographs was harmless error.

XII. THE PRESENTATION OF EXCESSIVE VICTIM IMPACT EVIDENCE DENIED MR. STESKAL A FUNDAMENTALLY FAIR PENALTY PHASE TRIAL.

A. Introduction.

Victim impact evidence – that is, evidence about the impact of the crime on the victim's survivors – is not inadmissible *per se* at the penalty phase of capital trials under *Payne v. Tennessee, supra,* 501 U.S. 808. But that does not mean that any and all victim impact evidence is automatically admissible.

As the Supreme Court recognized in *Payne*, some evidence is so prejudicial and inflammatory in the context of a particular case that its admission may render the penalty phase fundamentally unfair. *Payne v. Tennessee, supra,* 501 U.S. 808, 825.

This is such a case. The prosecution introduced victim impact testimony of six witnesses, including not just both of the victim's parents – the only members of his immediate family – but also the testimony of four non-family members, including three other employees of the sheriff's department. On top of this extensive testimony, the prosecutor also introduced photographs of the victim. Considered in the entire evidentiary context of this penalty phase re-trial, which as previously discussed included admission of the life-like mannequin dressed in Deputy Riches' vomit- and blood-stained uniform and belt, as well as gruesome photographs, and a jury view of the patrol car in which the victim had been shot, this additional victim impact evidence transgressed constitutional boundaries, and requires reversal of appellant's death sentence.

B. Background.

After the first jury had hung 11 to one for life imprisonment over the death penalty, the prosecution elected to retry the penalty phase. On September 2, 2003, the prosecution filed a third amended penalty notice. (8 CT 2091-2093.) In response, on September 24, 2003, the defense filed a motion for limitation and exclusion of victim impact evidence under Penal Code section 190.3, subdivision (a). (9 CT 2245-2283.)

Thereafter, the court heard argument on the motion to exclude (16 RT 3072-3139) and did exclude much of the prosecution's proposed victim impact evidence. (9 CT 2404.) The trial court did not, however, exclude the testimony of several victim impact witnesses who were not family members of the victim. The defense made a motion to reconsider directed to the court's rulings on these non-family-member witnesses, but the court denied reconsideration. (16 RT 3209-3217; 10 CT 2465.) The court also permitted, over defense objections, the admission of several photographs of the deceased. (24 RT 4718, 35 RT 6673, 6675.)

As shown in the statement of facts, four non-family members testified as victim impact witnesses.

Santa Ana Fire Department Captain James Henery testified that Riches had been his best friend, and that he had shared things with Riches he had never shared with anyone else. (24 RT 4691-4692.) In recent years, Riches was very close with Henery's children, and after Riches died, Henery put together a scrapbook for them documenting his friendship with Riches, and told them that Riches had gone to heaven to be with God. (24 RT 4692, 4695-4696.)

Deputy Sheriff Scott Vanover testified that he had met Riches in late 1998, and that they had become really good friends during the six to nine

months before Riches died. (24 RT 4724-4725.) Vanover had had a hard time coping with the loss of an older brother who died when Vanover was 11 or 12 years old, and Riches' death affected Vanover in much the same way. (24 RT 4726.)

Deputy Sheriff Eric Hendry testified that he met Riches in early 1999 when Riches was newly undertaking patrol duties. (24 RT 4729-4730.) As Riches' training officer, Hendry accompanied him in a patrol car for eight to ten hours each day teaching him how to do his job safely and properly, and in the process they became personally very close. (24 RT 4730-4731.) Riches' death was like losing a family member, and has impacted Hendry's marriage, his attitude toward his job, and his relationships with his children, his co-workers, and God. (24 RT 4733.) His children still talked about Riches, who had come to their house a few times. (24 RT 4733.)

Joseph Hoskins, a Sheriff's Department investigator, testified that he had known Riches for nine years as a co-worker and as a friend. (24 RT 4744-4745.) When they were both new deputies, they worked together at the jail. (24 RT 4747.)

C. The Excessive Victim Impact Evidence Was So Prejudicial as to Render the Penalty Phase Fundamentally Unfair.

The Supreme Court determined in *Payne* that its earlier decision in *Booth v. Maryland* (1987) 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 had been too restrictive as it "barred [the state] from either offering a 'glimpse of the life' which a defendant 'chose to extinguish,' [citation omitted] or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide." *Payne v. Tennessee*,

supra, 501 U.S. at p. 822. The state was entitled to present victim impact bearing on the defendant's moral culpability as a means of balancing the mitigating evidence presented by the defense in capital sentencing. *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.

But the victim impact testimony presented in this case was far more prejudicial than the testimony presented in *Payne* itself.

In *Payne*, a mother and her two year old daughter were killed with a butcher knife in the presence of the mother's three year old son who survived critical injuries in the attack. The victim impact testimony involved a single response to a question posed to the surviving child's grandmother. When asked about what she had observed in the child after witnessing his mother's and sister's murders, the grandmother testified that the boy cried for his mother and that he missed her and his sister. *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.

This case is readily distinguishable from *Payne*. The most obvious difference is the amount of victim impact testimony. The objectionable testimony in *Payne* consisted of a single response by one witness, the grandmother.

In this case, six witnesses spoke at length about the effects of the crime. The jury in Mr. Steskal's second penalty phase trial heard testimony from the mother of the victim, the father of the victim, one of his personal friends, and three of his co-workers. Thus, the sheer quantity of victim impact testimony in this case thus far outweighed the brief remark the high court found permissible in *Payne*.

The victim impact testimony in this case differed as much qualitatively from *Payne* as it did quantitatively. In *Payne*, the grandmother's response was a very brief observation about the sadness and

sense of loss any normal child would experience after losing a parent and a sister. The testimony in this case was far more detailed and the information was related in a highly emotional manner.

This case concerns victim impact evidence and testimony beyond that contemplated in *Payne v. Tennessee*. The *Payne* decision, therefore, does not support the admission of all of the victim impact testimony received in this case.

Moreover, the victim impact evidence that was admitted cannot be considered in a vacuum – it was part of a prosecution presentation that included the mannequin, and the jury view of the patrol car. The prosecutor used the emotional victim impact evidence effectively in closing argument. (36 RT 6838-6839, 6844-6845.) Even assuming for the purposes of analysis that, on a different record, the excessive victim impact evidence might not have been prejudicial, on this record, and even assuming the mannequin and jury view of the patrol car were permissible, the additional victim impact evidence certainly resulted in prejudice.

Appellant is, of course, aware that this Court has found admissible a range of victim impact evidence beyond that contemplated by the factual situation in *Payne*. In *People v. Brady, supra,* 50 Cal.4th at p. 578, the Court ruled that "[v]ictim impact evidence, however, is not limited to family members, but may include the effects on the victim's friends, coworkers, and the community—including when the victim's coworkers are law enforcement personnel." *Id.*, citing *People v. Ervine* (2009) 47 Cal.4th 745, 792–794. However, appellant respectfully suggests that cases such as *Brady* and *Ervine*, which approve victim impact testimony of non-family members, are neither authorized by nor consistent with the Supreme Court's opinion in *Payne*, and should be overruled.

XIII. BECAUSE THERE WAS NO EVIDENCE THAT MR. STESKAL'S ATTEMPTED ESCAPE FROM JAIL AFTER HIS FIRST PENALTY PHASE TRIAL INVOLVED VIOLENCE OR THE IMPLIED THREAT OF VIOLENCE AGAINST ANOTHER PERSON, THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF THE ATTEMPTED ESCAPE, AND INCORRECTLY INSTRUCTED THE JURY ON ATTEMPTED ESCAPE AND UNLAWFUL POSSESSION OF WEAPONS BY A PRISONER.

A. Introduction.

Not all evidence of other crimes is admissible as an aggravating factor:

> Evidence of actual or threatened violent criminal activity "that would allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt" is admissible under factor (b). (*People v. Griffin, supra,* 33 Cal.4th at p. 584, 15 Cal.Rptr.3d 743, 93 P.3d 344.) Such evidence must involve *actual, attempted, or threatened force or violence against a person, and not merely to property.* (*People v. Boyd* (1985) 38 Cal.3d 762, 776, 215 Cal.Rptr. 1, 700 P.2d 782.)

People v. Wallace (2008) 44 Cal.4th 1032, 1079 (emphasis added). This Court has made clear that evidence of an escape that does not involve the use or attempted use of force or violence is not admissible as an aggravating factor under section 190.3, factor (b):

> The evidence of defendant's *nonviolent* escapes was inadmissible as an aggravating factor under section 190.3, factor (b): "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence...."

People v. Castaneda (2011) 51 Cal.4th 1292, 1334. This is not a new rule. See *People v. Boyd* (1985) 38 Cal.3d 762, 776-777.

Nevertheless, the trial court in this case, contrary to the plain language of section 190.3 and this Court's interpretations of that language, erroneously admitted evidence that Mr. Steskal had, in the period of time between the mistrial caused by the first jury's inability to reach a penalty verdict on an 11-to-one deadlock for life, and the start of the second penalty phase trial, attempted to escape from the Santa Ana Jail. The erroneously admitted evidence included testimony of jail officers and two exhibits of implements that were used as digging tools to chip away at a wall of Mr. Steskal's jail cell.

While the trial court found that a jury could find evidence of an implied threat, in fact the record is devoid of any such evidence. As a consequence, the jury heard evidence and was instructed on an impermissible aggravating factor, and the judgment of death must be reversed.

B. Background.

After the prosecution served the defense with its third amended penalty notice, the defense filed a motion to strike several aggravating factors, including evidence of Mr. Steskal's attempted escape from Santa Ana Jail on or about August 25, 2003 – i.e., after the first jury had hung 11-to-one for a life-in-prison verdict. (9 CT 2119-2121.) The motion argued that the attempted escape was not a crime involving force or violence directed at a person, and was thus inadmissible under section 190.3, subdivision (b). (9 CT 2133-2136.)

Thereafter, the trial court heard argument on the motion (16 RT 3160-3171, 3235-3246), and ruled that the evidence of Mr. Steskal's escape attempt was admissible, based on the fact that Mr. Steskal faced a penalty phase retrial, and that he "possessed what could be termed and what the

court is terming at least two deadly weapons of which one could be found to be a sharp instrument." (16 RT 3243; see 16 RT 3246 (court disclaims reliance on other grounds).) The evidence was admitted, and the court instructed the jury on attempted escape as an aggravating factor under section 190.3, subdivision (b). (36 RT 7017-7018, 7019-7024.)

The two "deadly weapons" that the court found Mr. Steskal possessed included Exhibit 80E, which was a piece of metal attached to a paper handle, which jail officers had found on appellant's bunk, and which one officer believed might have been used as a scraping tool to dig at the wall. (24 RT 4626.) The officers found evidence that a small portion of the wall of appellant's cell had been chipped away to a depth of about one-third of an inch. (24 RT 4623-4624.)

The second alleged "deadly weapon," Exhibit 80D, was also found in Mr. Steskal's cell, and could also have been used as a digging tool: a pill bottle, partially filled with paper napkins, containing a Walkman battery in which a second piece of metal was embedded. (24 RT 4628, 4630, 4645.) Jail officer Kelvin LeGeyt testified that while either device could also conceivably be used a weapon, he could not say that that was their intended use. (24 RT 4627, 4632-4633, 4644-4647.) Though he characterized one of the tools as a "shank," LeGeyt had no knowledge of any intent by Mr. Steskal to use the tools as weapons. (24 RT 4646-4647.)

C. The Trial Court Admitted Evidence of Mr. Steskal's Nonviolent Escape Attempt in Violation of State and Federal Law.

The prosecution argued that Mr. Steskal violated Penal Code section 4532, subdivision (b), which prohibits any "prisoner ... charged with ... a

felony ... who is confined in any county or city jail" from attempting "to escape from a county or city jail" through "force or violence."

But an attempted escape, without more than property damage to a cell, is not a crime of actual or implied threat of force or violence against a person, as required for admission as a Penal Code section 190.3, subdivision (b) aggravating factor.

Violating Penal Code section 4532, subdivision (b) required Mr. Steskal to have been: 1) charged with a felony, 2) confined in a county or city jail, and 3) have attempted to escape by personally using force or violence or aiding, abetting, and/or conspiring with someone who did use force or violence. CALJIC 7.31; *People v. Moretto* (1994) 21 Cal.App.4th 1269, 1276. "Force or violence" may include perpetrating a "battery" on a person (CALJIC 7.31; CALJIC 16.141), or inflicting "any wrongful application of physical force against property...." to effectuate the escape. *People v. Lozano* (1987) 192 Cal.App.3d 618,626-628. Thus, in *People v. White* (1988) 202 Cal.App.3d 828, the Court of Appeal found sufficient evidence to convict the defendant for attempted escape by force or violence, where he created a hole in the ceiling of the cell, but never directed any force or violence at any person to escape.

But Penal Code section 190.3, subdivision (b) aggravating factors may only encompass those threats of violent injury that are directed against a person or persons. *People v. Lewis* (2001) 26 Cal.4th 334, 391-92. "Violent injury or the threat of violent injury to property" is insufficient to justify admissibility. *People v. Boyd, supra,* 38 Cal.3d at p. 776. As such, attempted escape by use of force or violence that is only directed against property is

> barred by the specific exclusionary language in section 190.3. It is also barred by the fact that, because the escape attempt did not involve violence or the threat of violence, the evidence is irrelevant to any of the specific aggravating and mitigating factors listed in section 190.3.

People v. Boyd, supra, 38 Cal.3d at pp. 776-777.

Thus, in *People v. Boyd, supra*, 38 Cal.3d at pp. 776-777, this Court found error when the prosecutor introduced evidence that a metal grating had been removed from the air vent in the defendant's cell, along with two t-shirts with dirt that might have come from the grating, because there was "no evidence that defendant used or threatened force or violence to any person." And in *People v. Jackson* (1996) 13 Cal.4th 1164, 1231-1234, the Court presumed error when the prosecutor introduced evidence that the defendant escaped from jail by breaking the thick plexiglass window of his cell using furniture.

This Court has rejected "the argument that all escapes, however nonviolent, are inherently dangerous because they invite efforts of prevention and apprehension by custodial and law enforcement officers. The possibility of violence during an escape can become an actuality only when, *under the facts of the particular case*, the escapee attempts violent resistance or, in his efforts to elude capture, conducts himself in a reckless manner." *People v. Jackson, supra,* 13 Cal.4th 1164, 1257.

Therefore, in *People v. Boyde* (1988) 46 Cal.3d 212, 250, the Court found the escape attempt involved threatened force where the defendant's escape plan called for the use of a gun to subdue the guard, if necessary. And in *People v. Gallego* (1990) 52 Cal.3d 115, 196, the Court found the defendant's escape attempt admissible where his escape conspiracy involved the use of a "shank" to help subdue a guard. And in *People v.*

Mason (1991) 52 Cal.3d 909, 955, the Court determined the escape plan would have been impossible to carry out without confrontation with prison guards, given the configuration of the jail.

> Not conceding the point, defense counsel proposed a hypothetical escape plan designed to show that defendant might have been able to escape without force. The plan involved cutting through three walls of bars and several windows and then rappelling over one hundred feet down the side of the building on a rope of bedsheets. However, to carry out such a time-consuming plan without encountering a guard was, according to uncontradicted testimony, impossible. Thus, the evidence adequately supports the trial court's ruling.

People v. Mason, *supra*, 52 Cal.3d at p. 956.

Here, there was no substantial evidence showing that Mr. Steskal attempted to escape from the Santa Ana Jail with the use or threatened use of force or violence against another person..

When the detention officers entered Steskal's cell, they found a 12 inch by 8 inch surface of the cell wall chipped away, to a depth of about a third of an inch. (24 RT 4623-4624.) The wall was cement, and had a thickness of 24 inches; it was chosen for the jail (which was new) because it was difficult to penetrate. (24 RT 4690.) The officers also found the tools used to chip away the wall underneath a blanket on Mr. Steskal's bed.

But there was no evidence that Mr. Steskal had intended to use these tools as instruments of violence or threats directed to any person. Indeed, the state of the record shows that was nothing more than unsupported speculation. Officer LeGeyt testified:

> Q. You equally would agree that what you found is consistent with tools used to cause damage on that wall, correct?
> A. Yes.
> Q. Okay. And because you don't know the intent of Mr. Steskal, you would agree that you cannot say that

any of those items were held by Mr. Steskal to be used as weapons, correct?
A. Correct, I don't know his intent.

(24 RT 4647.)[102]

There was *speculation* by Officer LeGeyt that the tools could be used as weapons, for slashing or sticking. (24 RT 4627, 4632.) There was evidence they *were* used for digging or chipping, and LeGeyt testified they

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[102] Officer LeGeyt additionally testified:

Q. Would you agree also that the question of whether or not an item is a weapon also is a question as to the intent the person has behind having that item?
A. Can't really say for the mentality of the person that has the item, what intent they have to use it for, ma'am. Whether it is used for one thing or another, or whether it could be used for multiple purposes.
Q. So, what I am asking you of is: If something, an item is as you characterize a weapon, it really depends on the intent of the person who is holding that item; isn't that true?
A. Yes, ma'am.
Q. Okay. So intent is an important issue behind whether or not something could be characterized as either a weapon or a tool. Would you agree with that?
A. Yes.
Q. And the items that you found, you would agree -- the items being the hair clipper, as well as this bottle with this metal portion sticking out are consistent with items that can be used as tools, correct?
A. They could be used as tools.
Q. Tools that could be used to chip away at that wall structure that you noticed in that cell, correct?
A. They could be, ma'am.
Q. And when you say that something is being possessed as a weapon, you would agree that that is speculation on your part, because you don't truly know

were consistent with that use. (24 RT 4645.) But Officer LeGeyt admitted that whether they were weapons depended on the intent of the person using them, and Officer LeGeyt further admitted that he could not say that either of these items were held by Mr. Steskal for use as weapons. (24 RT 4647.)

This record contains no evidence that Mr. Steskal ever intended to use these tools as weapons against a person.

More akin to *Boyd* and *Jackson*, Mr. Steskal may have used force or violence to destroy jail property in an attempt to effectuate his escape through a hole in his cell wall. But unlike *Boyde*, *Gallego*, and *Mason*, there was no evidence that any plan by Mr. Steskal included the use or threatened use of force or violence against the detention officers. As such, Mr. Steskal's attempted escape was not a crime of actual or implied threat of force or violence against a person as required for admission as a Penal Code section 190.3, subdivision (b) aggravating factor.

Moreover, as shown in previous arguments, the Eighth Amendment demands a heightened degree of "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina, supra,* 428 U.S. 280, 305. Here, the introduction of this impermissible evidence undermined the reliability of Mr. Steskal's penalty phase re-trial, in violation of the Eighth Amendment, as well as the fair trial guarantees of the Sixth and Fourteenth Amendments. Further, the failure of the state to abide by its own rules violated Mr. Steskal's right to due

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that person's state of mind, correct?

A. I would look at it more as just the type of who possesses it or -- you cannot really say whether they intend to use it or not, whether it is for protection or such.

(24 RT 4644-4646.)

process under the Fourteenth Amendment. See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175.

D. The Trial Court Erroneously Instructed the Jury.

Because there was no evidence that Mr. Steskal had (a) actually used the tools with force or violence against another person, or (b) attempted to do so, or (c) threatened to do so, the trial court improperly overruled Mr. Steskal's motion to exclude such evidence. (9 CT 2119.) Thereafter, the trial court instructed the jury under section 190.3, subdivision (b) on the unadjudicated offenses of attempted escape under Penal Code section 4532, subdivision (b), violation of Penal Code section 4574, subdivision (b) (prisoner in possession of a deadly weapon), and Penal Code section 4502 (prisoner in possession of a stabbing instrument), on the theory that both offenses involved the express or implied use of force or violence or the threat of force or violence. (36 RT 7016-7026.) The instructions were just as erroneous as the evidentiary ruling.

The consequence was violation not just of the statutory language of section 190.3, but of the Eighth Amendment's guarantee of a fair and reliable penalty phase trial, and the Fourteenth Amendment's guarantee of due process. *Woodson v. North Carolina, supra,* 428 U.S. 280; *Payne v. Tennessee, supra*, 501 U.S. 808, 825; *Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.

> Appellant is, of course, aware that this Court has long regarded it as settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b).

People v. Tuilaepa (1992) 4 Cal.4th 569, 589, *aff'd sub nom. Tuilaepa v. California* (1994) 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750; see *People v. Bacon* (2010) 50 Cal.4th 1082, 1127.

Appellant respectfully suggests, however, that in a case such as this – in which the instruments themselves are entirely consistent with a use that, though unlawful, is directed at a nonviolent escape and does not involve violence against a person, and in which there is evidence suggesting that the tools were likely used for digging purposes, but when there is *no* evidence that the tools were ever used, or intended to be used, in connection with an act of "actual, attempted, or threatened force or violence against a person," *People v. Wallace, supra,* 44 Cal.4th at p. 1079, there can be no support for a conclusion that the tools were used or intended to be used for such purposes. Admission of this evidence, and instructions to the jury on this theory, deprived Mr. Steskal of a fair and reliable penalty phase as required by the Eighth Amendment, and of a fundamentally fair trial as mandated by federal due process guarantees.

E. The Errors Require Reversal.

The rigorous standards of harmless error applicable to penalty phase errors under *Chapman v. California* and *People v. Brown* cannot be satisfied in this case. As this Court has previously noted,

> "erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty." (*People v. Gallego* (1990) 52 Cal.3d 115, 196.)

People v. Jackson, supra, 13 Cal.4th at p. 1232. As we have seen in the discussion of the prejudicial effects of other penalty phase errors, there was no reason to believe a penalty of death was a foregone conclusion in this case. The fact that the first jury could not reach a verdict as to penalty is itself a strong indication that any error in a subsequent penalty phase re-trial such as this is likely to have been prejudicial.

Here, the prosecutor repeatedly spoke of Mr. Steskal's attempted escape from the Santa Ana Jail in his closing argument for the death penalty. (36 RT 6783, 6829-6831, 6846.)

> "There is no reason why [this Court] should treat th[e] evidence as any less crucial than the prosecutor -- and so presumably the jury -- treated it."

People v. Cruz (1964) 61 Cal.2d 861, 868. At the very least, "the cumulative effect of" these combined errors and the penalty phase errors challenged elsewhere in this brief "violated the due process guarantee of fundamental fairness" and requires reversal. *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 & fn. 15, 98 S.Ct. 1930, 56 L.Ed.2d 468. The penalty judgment may not stand.

XIV. RATHER THAN INSTRUCTING THE JURY TO DETERMINE THE FACTUAL ISSUES, THE TRIAL COURT ERRONEOUSLY TOLD THE JURY THAT THE FACTOR (B) OFFENSES "INVOLVED THE EXPRESS OR IMPLIED USED OF FORCE OR VIOLENCE OR THE THREAT OF FORCE OR VIOLENCE," IN VIOLATION OF CALIFORNIA LAW AND OF MR. STESKAL'S FEDERAL CONSTITUTIONAL RIGHTS.

A. The Trial Court's Instruction on Unadjudicated Offenses.

With respect to the unadjudicated offenses, the trial court instructed the jury, in pertinent part:

> "Evidence has been introduced for the purpose of showing that the defendant, Maurice Gerald Steskal, has committed the following criminal acts: Assault on a peace officer, attempted escape, prisoner in possession of a deadly weapon, prisoner manufacturing or in possession of a stabbing instrument known as a shank, *which involved the express or implied use of force or violence or the threat of force or violence.*
>
> "Before a juror may consider any criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant, Maurice Gerald Steskal, did, in fact, commit the criminal act.
>
> "A juror may not consider any evidence of any other criminal acts as an aggravating circumstance. It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose."

(36 RT 7017-7019 (emphasis added).)

B. The Instruction Violated California and Federal Law.

Whether the factor (b) offenses "involved the express or implied use of force or violence or the threat of force or violence" was supposed to be a question for the jury. See, e.g., *People v. Mason, supra,* 52 Cal.3d 909, 957

(defendant's "innocent explanation" for possession of homemade "stabbing weapon . . . raises an ordinary evidentiary conflict for the trier of fact" with respect to whether his possession of the weapon constituted "an implied threat of violence"); *People v. Williams, supra,* 16 Cal.4th 153, 238 ("the jury" could reject or "accept defendant's explanation" whether "he possessed the shank for violent purposes").

By defining the alleged criminal activities as acts that did involve the actual threat or implied use of force or violence, the instruction removed this issue from the jury's consideration. Moreover, the trial court impermissibly increased the weight of the evidence by escalating the defined level of force from an implied threat to an actual threat or implied use of force or violence. Accordingly, it violated appellant's right to due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, sections 7 and 15) and compromised the reliability of the penalty verdict in violation of Eighth Amendment standards.

The problem is that the instruction set out above answered the question for the jurors. A juror was reasonably likely to interpret the instruction as: 1) definitively asserting that the unadjudicated offenses "involved the express or implied use of force or violence or the threat of force or violence"; and 2) directing the jurors simply to determine whether Mr. Steskal committed the unadjudicated offenses.

The instruction thus constituted a directed verdict on an essential element of the factor (b) finding the jury was to make. Usurping the jury's function in this way violated appellant's rights to due process and trial by jury as guaranteed by the Fifth, Sixth, and Fourteenth Amendments. See *Carella v. California, supra,* 491 U.S. at pp. 265-266 (mandatory presumption violates due process); *People v. Hernandez* (1989) 46 Cal.3d

194, 211 (instruction that "effectively removed . . . issue . . . from jury" violates due process); *United States v. Caldwell* (9th Cir. 1993) 989 F.2d 1056, 1060-1061 (failing to instruct on essential element violates Sixth Amendment right to findings by jury).

The prosecution must prove beyond a reasonable doubt criminal activity offered as aggravation under Penal Code section 190.3, subdivision (b). *People v. Robertson* (1982) 33 Cal.3d 21, 54. Before this evidence is considered in aggravation, under the plain language of factor (b), the jury must also find that the acts involved force or violence. This is a question of fact rather than law:

> "[W]hether a particular instance of criminal activity 'involved ... the express or implied threat to use force or violence' (§ 190.3, subd. (b)) can only be determined by looking to the facts of the particular case."

People v. Mason, supra, 52 Cal.3d at p. 955. Accordingly, the jury must determine both that a particular act occurred and that the act involved the requisite force or violence. See *People v. Figueroa* (1986) 41 Cal.3d 714, 734 (factual determinations are for the jury to decide).

Appellant had a due process right to be sentenced under California's statutory guidelines that require the jury to determine the applicable aggravating and mitigating factors. *Hicks v. Oklahoma*, *supra,* 447 U.S. at 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300. Here, the instruction violated due process by creating a mandatory presumption that the evidence constituted an actual threat or implied use of force or violence. Once the jury found the underlying fact to be true, they were to presume that it constituted an implied use or actual threat of force or violence and apply the aggravating factor against appellant. See *Francis v. Franklin*

(1985) 471 U.S. 307, 314, 105 S.Ct. 1965, 85 L.Ed.2d 344 ("mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts"); *People v. Figueroa, supra,* 41 Cal.3d at p. 724 (instruction effectively directed verdict by removing other relevant considerations if the jury finds one fact to be true). This foreclosed any independent consideration of the required elements of the aggravating factor. *Carella v. California, supra,* 492 U.S. 263, 266.

The instruction directed the jury to infer the implied use or the threat of force or violence once the criminal activity was proved. Accordingly, the instruction improperly removed the factual issue of appellant's actual or implied threat of force from the jury's consideration in violation of appellant's statutory and due process rights. See *People v. Figueroa, supra,* 41 Cal.3d at pp. 725-726.

Moreover, the instruction erred by defining the criminal act as involving the "implied use" of force or violence, rather than the "implied threat" of such use. See Penal Code section 190.3, subdivision (b); *People v. Tuilaepa, supra,* 4 Cal.4th 569, 589, affirmed on other grounds in *Tuilaepa v. California* (1994) 512 U.S. 967, 973, 114 S.Ct. 2630, 129 L.Ed.2d 750. As discussed above, a threat involves an intention to use force or violence when such force has not actually been used. Even after issuing a threat, an offender may retreat or decide not to follow through on the threat. Threats do not necessarily lead to violence. Accordingly, the resulting verdict violated appellant's due process rights and was unreliable in violation of Eighth Amendment standards. *Beck v. Alabama, supra,* 447

U.S. at 637 (Eighth Amendment requirements of reliability in a capital case).

Defense counsel's failure to object to the erroneous and misleading instruction cannot be deemed a waiver. Penal Code section 1259.

C. The Instruction Was Prejudicial.

In the guilt phase of a case, such error requires per se reversal of any conviction requiring a jury finding of the omitted element. *People v. Hernandez, supra*, 46 Cal.3d at 211. Applying that principle to the penalty phase -- when written "convictions" on the factor (b) allegations are not required -- the Court would presume that the jury found the factor (b) offenses had been proved, deem the "convictions" defective, and ask whether the defective "convictions" were harmless beyond a reasonable doubt. See *People v. Clair, supra,* 2 Cal.4th at p. 680 (where error shown in regard to aggravating circumstance urged by the prosecution, this Court will presume that one or more jurors found the circumstance to be true, then ask whether the erroneous finding was harmless beyond a reasonable doubt).

Applying that standard, the erroneous "conviction" on this factor (b) allegation was not harmless beyond a reasonable doubt.

If the Court finds that the erroneous instruction does not require application of a per se standard, then the analysis would be different. For this factor (b) offense, the first question would be: If the jurors had been properly instructed, is it reasonably possible that one or more would not have found beyond a reasonable doubt that the offense "involved the express or implied use of force or violence or the threat of force or

violence"? The instruction under discussion -- if corrected -- would have forced the jurors to focus on that very flaw in the prosecution's case.

If the jurors had been forced to ask themselves whether Mr. Steskal's attempted escape from the Santa Ana Jail, or his possession of tools that he used to attempt to dig an escape route, "involved the express or implied use of force or violence or the threat of force or violence," it is reasonably possible that one or more would have answered that question in the negative. As discussed in Argument XIII, *supra*, in connection with the attempted escape and weapons offenses, there was no evidence whatsoever that Mr. Steskal actually used force or violence against another person, or (b) attempted to do so, or (c) threatened to do so. Furthermore, it is reasonably possible that a change in a juror's vote on one or more of the unadjudicated offense allegations would have resulted in a change in that juror's vote with regard to penalty.

The mere possibility that an instruction created a mandatory presumption is error. *Sandstrom v. Montana* (1979) 442 U.S. 510, 519, 99 S.Ct. 2450, 61 L.Ed.2d 39. Because the error here violated due process and Eighth Amendment standards, it requires reversal unless it can be shown to be harmless beyond a reasonable doubt. *Chapman v. California, supra,* 386 U.S. 18, 24. Similarly, this Court has similarly determined that any substantial error in the penalty phase of a capital trial must be deemed prejudicial. *People v. Robertson, supra,* 33 Cal.3d at p. 54.

Plainly – as evidenced in by the first penalty phase trial, in which the jurors hung eleven to one for a life imprisonment verdict – a death verdict was not a foregone conclusion in this penalty phase retrial. Violent though the offense was, there were powerful mitigating factors as well, notably Mr. Steskal's severe mental illness, and lack of a substantial history of violence.

But the trial court told the jury that the unadjudicated offenses "involved the express or implied use of force or violence or the threat of force or violence." (36 RT 7018.) The prosecutor emphasized the unadjudicated offenses in his closing argument for death. (36 RT 6783, 6829-6831, 6846.) Had the jury been properly instructed, it is more than reasonably possible that the second penalty phase trial would have had a different result.

XV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system. See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." *Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6, 126 S.Ct. 2516, 165 L.Ed.2d 429.[103] See also *Pulley v. Harris* (1984) 465 U.S. 37, 51, 104 S.Ct. 871, 79 L.Ed.2d 29 (while comparative proportionality review is not an essential component of every constitutional

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[103] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." 548 U.S. at p. 178.

capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who

are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Appellant's Death Sentence is Invalid Because Penal Code Section 190.2 is Impermissibly Broad.

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)' "

People v. Edelbacher, supra, 47 Cal.3d 983, 1023.

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7." This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the

statute contained thirty-three special circumstances[104] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. *People v. Dillon* (1983) 34 Cal.3d 441. Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515. These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the

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[104] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797.

Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

B. Appellant's Death Penalty is Invalid Because Penal Code Section 190.3, Subdivision (a) As Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Penal Code section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[105] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[106] or having had a "hatred of religion,"[107] or

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[105] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox*, *supra,* 47 Cal.3d 207, 270; see also CALJIC No. 8.88, par. 3.

[106] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[107] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

threatened witnesses after his arrest,[108] or disposed of the victim's body in a manner that precluded its recovery.[109] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California supra*, 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. *Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J. Factor (a) is used to embrace facts which are inevitably present in every homicide. *Ibid.* As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to

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108 *People v. Hardy, supra,* 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

109 *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35, *cert. den.* 496 U.S. 931 (1990).

apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 108 S.Ct. 1853, 100 L.Ed.2d 372 (discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398). Viewing section 190.3 in context of how it is actually used, it is apparent that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; It Therefore Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" provision (section 190.2) or in its sentencing guidelines (section 190.3). Section 190.3, subdivision (a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they

outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a

reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 20 S.Ct. 2348, 147 L.Ed.2d 435 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. *Id.* at p. 478.

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. *Id.*, at p. 593. The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511), it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. *Id.*, at p. 598. The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the

Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." *Blakely v. Washington, supra*, 542 U.S. at p. 299. The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. *Ibid.* The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. *Id.* at p. 313.

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at p. 304; italics in original.

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a

jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker, supra,* 543 U.S. at p. 244.

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *Cunningham v. California, supra*, Section III. In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. *People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[110] As set forth in California's "principal sentencing instruction" (*People v. Farnam, supra,* 28 Cal.4th

[110] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." *People v. Brown, supra,* 46 Cal.3d 432, 448.

107, 177), which was read to appellant's jury (31 RT 4720), an aggravating factor is "*any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" CALJIC No. 8.88; emphasis added.

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[111] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[112]

This Court has repeatedly rejected the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." *People v. Demetroulias, supra,* 39 Cal.4th 1,

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[111] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" *Id.*, at p. 460

[112] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown* (1985) 40 Cal.3d 512, 541.

41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow (2003)* 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275. It has applied precisely the same analysis regarding *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." 35 Cal.4th at 1254.

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[113] In *Cunningham* the principle that any fact which exposes a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. *Id.*, at pp. 6-7. That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum

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[113] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black:* "Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" *Black*, 35 Cal.4th at p. 1253; *Cunningham, supra,* at p.8.

must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *Cunningham, supra*, p. 13.

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." *Id.*, p. 14.

> "The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* 'bright-line rule' was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that '[t]he high court precedents do not draw a bright line')." *Cunningham, supra,* at p. 13.

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In response to the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2, subdivision (a)), *Apprendi* does not apply. *People v. Anderson, supra,* 25 Cal.4th at p. 589. After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted),

Ring imposes no new constitutional requirements on California's penalty phase proceedings." *People v. Prieto*, *supra*, 30 Cal.4th at p. 263.

This holding is incorrect. As Penal Code section 190, subdivision (a)[114] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." *Cunningham, supra*, at p. 6.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> "This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151."

Ring, 536 U.S. at p. 604.

[114] Section 190, subdivision (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." *Ring*, *supra*, 536 U.S. at p. 604. Section 190, subdivision (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. Section 190.3; CALJIC 8.88 (7th ed., 2003). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 530 U.S. at p. 604. In *Blakely*, the high court made it clear that, as Justice Breyer observed in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." 542 U.S. at p. 328, emphasis in original. The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite

factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State, supra*, 59 P.3d 450.[115]

No greater interest is ever at stake than in the penalty phase of a capital case. *Monge v. California* (1998) 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 ["the death penalty is unique in its severity and its finality"]. [116] As the high court stated in *Ring, supra*, 536 U.S. at p. 589:

[115] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[116] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755, 102 S.Ct. 1388, 71 L.Ed.2d 599) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" *Monge v. California*,

> "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding

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supra, 524 U.S. at p. 732 (emphasis added).

those rights." *Speiser v. Randall* (1958) 357 U.S. 513, 520-521, 78 S.Ct. 1332, 2 L.Ed.2d 1460.

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendments. *In re Winship, supra,* 397 U.S. at p. 364. In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida, supra,* 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207. Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. *Winship, supra,* 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323; *Santosky v. Kramer, supra,* 455 U.S. 743, 755.

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley*

(1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator). The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the "weight and gravity" of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'"

455 U.S. at p. 755.

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." *Santosky*, *supra*, 455 U.S. at p. 763. Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, *supra*, 397 U.S. at p. 363.

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson, supra*, 428 U.S. at p. 305. The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979). " *Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added). The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. *California v. Brown, supra*, 479 U.S. at p. 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195,96 S.Ct. 2909, 49 L.Ed.2d 859. Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316, 83 S.Ct. 745, 9 L.Ed.2d 770.

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. *People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893. Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. *In re Sturm* (1974) 11 Cal.3d 258. The parole board is therefore required

to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." *Id.*, 11 Cal.3d at p. 267. [117] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. Penal Code section 1170, subdivision (c). Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. *Harmelin v. Michigan, supra,* 501 U.S. 957, 994. Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15, 108 S.Ct. 1860, 100 L.Ed.2d 384. Even where the decision to impose death is "normative" (*People v. Demetrulias, supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

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[117] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. See Section C.1, *ante*.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. See *Kansas v. Marsh, supra* (statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors). The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has

required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*." (Emphasis added.)

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. *Harris*, 465 U.S. at p. 52, fn. 14. That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. See Section A of this Argument, *ante*. The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an

invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. See *People v. Fierro* (1991) 1 Cal.4th at p. 253. The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947. This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. *Johnson v. Mississippi* (1988) 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575; *State v. Bobo* (Tenn. 1987) 727

S.W.2d 945. Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1034. The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the

reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. *Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235.

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, '*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors*.' (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)"

People v. Morrison (2004) 34 Cal.4th 698, 730 (emphasis added.).

This assertion is incorrect. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. *Id.*, 32 Cal.4th at pp. 727-729. This Court recognized that the trial court so

erred, but found the error to be harmless. *Ibid.* If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. See, e.g., *People v. Montiel, supra,* 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd, supra,* 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Fetterly v. Paskett, supra,* 997 F.2d at p. 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 (same analysis applied to State of Washington).

It is thus likely that appellant's jury determined his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated state law, and the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." *Stringer v. Black* (1992) 503 U.S. 222, 235, 112 S.Ct. 1130, 117 L.Ed.2d 367.

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating

circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma, supra,* 455 U.S. 104, 112. Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates the Equal Protections Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants that are Afforded to Non-Capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. See, e.g., *Monge v. California, supra,* 524 U.S. at pp. 731-732. Despite these directives, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." *People v. Olivas* (1976) 17 Cal.3d 236, 251. If the interest is "fundamental," then courts have "adopted an attitude of active and

critical analysis, subjecting the classification to strict scrutiny." *Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785. A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. *People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L. Ed. 165.

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[118] as in *Snow*,[119] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. See also *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

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[118] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." *Prieto, supra,* 30 Cal.4th at p. 275; emphasis added.

[119] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." *Snow, supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. See, e.g., Penal Code sections 1158, 1158a. When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subdivision (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[120]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*. And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. See Section C.3, *ante*. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[121]

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[120] In light of the Supreme Court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

[121] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Ring*, *supra*, 536 U.S. at p. 609.

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra,* 897 F.2d at p. 421; *Ring v. Arizona, supra.*

E. California's Use of the Death Penalty as A Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments.

The United States remains one of a small number of nations that regularly uses the death penalty as a form of punishment. The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. See, e.g., *Stanford v. Kentucky, supra,* 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. 815, 830 [plur. opn. of Stevens, J.]. Indeed, *all* nations of Western Europe have now abolished the death penalty. Amnesty International, "Death Sentences and Executions 2012" (2012), p. 50, on Amnesty International website http://www.amnestyusa.org/sites/default/files/worlddpreport2012.pdf (last accessed July 15, 2014).

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent,

'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" 1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, (1895) 159 U.S. 113, 227, 16 S.Ct. 139, 40 L. Ed. 95; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of intellectually disabled persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins v. Virginia, supra,* 536 U.S. 304, 316 fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316. Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. *Hilton v. Guyot, supra,* 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death

penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[122] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. Cf. *Ford v. Wainwright* (1986) 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335; *Atkins v. Virginia, supra.*

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[122] See Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. L.Rev. 1, 30.

XVI. THE JUDGMENT SHOULD BE REVERSED DUE TO CUMULATIVE ERROR THAT DEPRIVED MR. STESKAL OF A FAIR PENALTY PHASE RE-TRIAL.

Each of the grounds set forth above prevented Mr. Steskal from receiving a fair capital murder trial as guaranteed by state law and by the Fifth, Sixth, Eighth and Fourteenth Amendments, and each one warrants reversal of the judgment of death. But even if the Court should conclude that any one of the federal or state law violations shown above is insufficient to require a new penalty phase trial, the Court should consider the effect of the errors taken together, and reverse due to cumulative error.

As this Court stated in *People v. Hill, supra*, 17 Cal.4th at pp. 844-845:

> *"a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.* (*People v. Purvis, supra,* 60 Cal.2d at pp. 348, 353 [combination of 'relatively unimportant misstatement[s] of fact or law,' when considered on the 'total record' and in 'connection with the other errors,' required reversal]; *People v. Herring, supra,* 20 Cal.App.4th at pp. 1075-1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal]; see *In re Jones* (1996) 13 Cal.4th 552, 583, 587 [cumulative prejudice from defense counsel's errors requires reversal on habeas corpus]; *People v. Ledesma* (1987) 43 Cal.3d 171, 214-227 [same]; see also *Samayoa, supra*, 15 Cal.4th at p. 844 [prosecutorial misconduct does not require reversal "whether considered singly or together"]; *People v. Bell* (1989) 49 Cal.3d 502, 534 [considering 'the cumulative impact of the several instances of prosecutorial misconduct' before finding such impact harmless]; cf. *People v. Espinoza, supra*, 3 Cal.4th at p. 820 [noting the prosecutorial misconduct in that case was 'occasional rather than systematic and pervasive'].)"

Accord, e.g., *Thomas v. Hubbard, supra*, 273 F.3d 1164, 1179 ("'Errors that might not be so prejudicial as to amount to a deprivation of due process

when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'").

In this case, as shown above, any of the errors independently provide grounds for reversal. Taken together, the cumulative impact of any two or more of the errors produced an unfair penalty phase trial under California law, prejudicially deprived Mr. Steskal of due process of law under the Fourteenth Amendment, and resulted in an unfair and unreliable capital murder trial in violation of the Eighth Amendment.

CONCLUSION.

For the foregoing reasons, the Court should reverse appellant Maurice G. Steskal's judgment of conviction and sentence of death.

DATE: July __, 2014

Respectfully submitted,

_____
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CERTIFICATE OF WORD COUNT

I certify that the forgoing Appellant's Opening Brief contains 89,929 words, exclusive of tables, according to the word-count feature of Open Office.

DATE: July __, 2014

GILBERT GAYNOR
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PROOF OF SERVICE

I, Gilbert Gaynor, am an attorney, over the age of 18 years and not a party to the within action. My business address is Gilbert Gaynor, Cal. Bar No. 107109, c/o Seton Hall University School of Law, One Newark Center, 1109 Raymond Boulevard, Newark, NJ 07102.

On July __, 2014, I served the document entitled APPELLANT'S OPENING BRIEF by placing a true and correct copy of the document in an envelope addressed as indicated on the attached Service List.

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